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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NEW YORK STOCK EXCHANGE, INC. AND
INVESTMENT COMPANY INSTITUTE,
Petitioners

v.

JOHN G. HEIMANN, COMPTROLLER OF THE CURRENCY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The New York Stock Exchange, Inc., and the Investment Company Institute petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The rulings of the Comptroller of the Currency (Appendix A) are unreported. The opinion of the district court (Appendix B, *infra*, pp. 32a) is reported *sub nom. New York Stock Exchange* v. *Smith*, at 404 F. Supp. 1091 (D.D.C. 1975). The opinion of the Court of Appeals (Appendix C, *infra*, pp. 53a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 1977 (Appendix C, *infra*, p. 53a). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Court of Appeals on August 31, 1977 (Appendix D, *infra*, p. 70a-71a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners are entitled to judicial review of rulings of the Comptroller of the Currency interpreting § 16 of the Glass-Steagall Act, 12 U.S.C. § 24.

2. Whether the Comptroller of the Currency erred in ruling that § 16 of the Glass-Steagall Act, 12 U.S.C. § 24, which allows national banks to purchase and sell securities "solely upon the order, and for the account of, customers," permits them to offer a brokerage type service known as Automatic Investment Service to the public.

STATUTES INVOLVED

The pertinent provisions of § 16 of the Glass-Steagall Act, 12 U.S.C. § 24, are set forth in Appendix E, *infra*, p. 72a.

STATEMENT

On February 27, 1973, in response to a request from a national bank, the Comptroller of the Currency ("Comptroller") issued a one-page letter ruling that national banks are permitted under § 16 of the Glass-Steagall Act ("Act") to offer to the public a brokerage type service called Automatic Investment Service ("AIS"). Under AIS, a participant selects one or more common stocks from a list of twenty-five stocks selected because

they are the highest volume stocks on Standard & Poor's 425 Industrial Index. The participant authorizes the bank to make monthly purchases of that stock for him. The bank pools the orders, purchases the stock, and deducts from the participant's account the cost (including brokerage fees) of the stock and a service charge. AIS is advertised to the general public and not solely to pre-existing customers of the bank.[1]

At the request of the New York Stock Exchange and the Investment Company Institute, petitioners herein, the Comptroller agreed to reconsider his ruling. On June 10, 1974, after reviewing submissions from petitioners and others interested in the banking and securities industries, the Comptroller issued a second ruling in the form of a 23-page letter discussing in detail the issues raised in the submissions.

The Comptroller's letter rendered an "Opinion" that § 16 of the Act permits national banks to purchase and sell stock as agents for their customers through the AIS device; to make a profit in so doing; and to advertise the availability of this service. Appendix A, *infra*, pp. 21a-22a. The Comptroller then addressed "Policy Considerations" with respect to abuses which might develop from the operation by national banks of AIS services, concluding that:

> Since our opinion is that Section 16 on its face clearly and unambiguously permits AIS service, such considerations are matters more relevant to future supervisory vigilance than to the statutory interpretation which is the subject of this letter. Appendix A, *infra*, p. 22a.

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[1] AIS has been promoted extensively with television advertisements during National Football League games and in magazines and newspapers of general circulation. See the Joint Appendix filed in the Court of Appeals at 140, 144-53, 167.

Petitioners sought judicial review in the District Court of the Comptroller's February 27, 1973, and June 10, 1974, rulings with respect to § 16. The District Court held that petitioners have a right of judicial review. On the merits, the District Court concluded that the Comptroller had properly interpreted § 16 of the Act.

On appeal, the United States Court of Appeals for the District of Columbia Circuit, characterizing the Comptroller's rulings as "tentative and provisional," held that petitioners have no right of judicial review and ordered the complaint dismissed. Appendix C, *infra*, p. 68a.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals denying judicial review of the Comptroller's rulings is in conflict with the landmark decision of this Court in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

Abbott Laboratories established that authoritative agency constructions of Federal statutes are ripe for judicial review. In that case, drug manufacturers sought judicial review of regulations issued by the Commissioner of Food and Drugs requiring that the labels on trade name drugs also indicate the "established names" of the drugs. In analyzing the propriety of judicial review, this Court instructed:

> The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. 387 U.S. at 149.

On the facts before it, the Court held that the issue was fit for judicial decision, stating that "the issue tendered is a purely legal one: whether the statute was properly construed by the Commissioner . . . ." 387 U.S. at 149. With respect to the hardship of withholding consideration, the Court found that the Commissioner's regulations had been "felt in a concrete way by the challenging parties." 387 U.S. at 148-49.

In the present case, the Court of Appeals denied judicial review of an agency ruling on a "purely legal" question—whether § 16 of the Act was properly construed by the Comptroller. The District Court recognized that "[t]here is no doubt that the case at bar presents a 'purely legal' question only, the validity of the Comptroller's construction of the Glass-Steagall Act." 404 F. Supp. at 1095; Appendix B, *infra*, p. 38a. Moreover, petitioners have felt the effects of the Comptroller's rulings "in a concrete way" as national banks have developed AIS plans through widespread advertising and have promoted them at the expense of the business of the members of the New York Stock Exchange and the Investment Company Institute. The District Court explicitly found that "the petitioners will suffer substantial hardship if the court withholds consideration of the Comptroller's letter at this time." *Id.* As the District Court also noted, the impact of denying judicial review is particularly severe here, because petitioners cannot challenge the Comptroller's rulings by disobeying them. *Id.*[2]

The Court of Appeals' effort to distinguish the present case from *Abbott Laboratories* by characterizing the Comptroller's rulings as "tentative and provisional" is unavailing. The Comptroller intended to and did engage in "statutory construction" and concluded that "Section 16 clearly and unambiguously permits AIS Service . . . ." Appendix A, *infra*, p. 22a. Whatever subsequent events

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[2] The opinion of the Court of Appeals endorses the novel notion that the right of judicial review can be defeated merely by the suggestion that appellants can bring private actions against national banks which offer AIS. Appendix C, *infra*, p. 65a-66a. Apart from the absence of support in the cases decided by this Court for denying judicial review on this basis, the initiation of multiple private actions would burden the courts and the parties unnecessarily.

may show about the effectiveness of AIS plans or about the need for supervision of those plans by the Comptroller, they will teach nothing about whether Congress intended in § 16 of the Act to prohibit banks from engaging in activities such as AIS.

2. The Comptroller's rulings breach the wall of separation between commercial banking and the securities business which Congress erected in the Glass-Steagall Act. Whether the Comptroller correctly interpreted § 16 of the Act is an important question of Federal law which should be settled by this Court.

A substantial purpose of the Glass-Steagall Act was to insure public confidence in national banks by limiting their involvement in the securities business. The core of the separation is contained in § 16, 12 U.S.C. § 24, which provides in pertinent part that "[t]he business of dealing in securities and stock by [national banks] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers . . . ." The separation is reflected as well in § 20, 12 U.S.C. § 377, which prohibits "affiliation" of national banks with organizations engaged principally in the securities business, and in § 32, 12 U.S.C. § 78, which prohibits any person engaged principally in the securities business from serving concurrently as an officer, director, or employee of a national bank.

The Comptroller's contemporaneous interpretation of § 16 faithfully carried out the purposes of the Act, which this Court has characterized as "a prophylactic measure." *Investment Company Institute* v. *Camp*, 401 U.S. 617, 639 (1971). Among the restrictions contemporaneously imposed by the Comptroller were that banks could only buy and sell securities as an "accommodation" to customers; that this customer relationship had to exist independently of the securities transaction; and that banks could not engage in such accommodation transactions for profit. *See* 1933 Annual Report of the Comptroller of the Currency (1934); Comptroller of the Currency, *Interpretative Rulings with Respect to Section 5136, U.S.R.S.* (1936); Comptroller of the Currency, *Digest of Opinions* § 220A (1948), § 220A (1957), § 220 (1960).

The rulings challenged here represent a reversal of the Comptroller's long-standing position. Under the terms of the new rulings, national banks not only may offer AIS to their regular customers, but also may advertise AIS to attract new customers and may operate AIS not merely as an accommodation but as a profit-making venture. Appendix A, *infra*, p. 21a-22a.

This permissive view of § 16, premised on the Comptroller's policy views that "AIS will be a pro-competitive force" and will provide a "convenient means within reach of . . . many bank customers," Appendix A, *infra*, p. 23a, is sharply at odds with the Act. As this Court admonished in *Investment Company Institute* v. *Camp*, *supra*, "policies of competition, convenience, or expertise" are outweighed by the " 'hazards' and 'financial dangers' that arise when commercial banks engage in the activities proscribed by the Act." 401 U.S. at 630.[3]

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[3] The Comptroller has attempted repeatedly in recent years to broaden the powers of national banks in the face of statutory limitations and has been rebuffed repeatedly by the courts. *See, e.g., Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971) (sponsoring and operating a mutual fund); *Independent Bankers Ass'n of America* v. *Smith*, 534 F.2d 921 (D.C. Cir.), *cert. denied sub nom. Bloom* v. *Independent Bankers Ass'n of America*, 429 U.S. 862 (1976) (providing customer-bank communication terminals); *First Nat'l Bank* v. *Dickinson*, 396 U.S. 122 (1969) (setting up armored car service and deposit receptacles); *Arnold Tours, Inc.* v. *Camp*, 472 F.2d 427 (1st Cir.), *aff'g* 338 F. Supp. 721 (D. Mass. 1972) (acting as travel agent); *Saxon* v. *Georgia Ass'n of Independent Ins. Agents, Inc.*, 399 F.2d 1010 (5th Cir. 1968) (selling life insurance); *Baker, Watts & Co.* v. *Saxon*, 261 F. Supp. 247 (D.D.C. 1966),

Moreover, the Comptroller's new interpretation flies in the face of Congressional inaction amounting to endorsement of his original interpretation. This Court has recently held, in rejecting an attempt by the N.L.R.B. to reverse its prior construction of a statutory provision, that:

> [A] court may accord great weight to the long-standing interpretation placed upon a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.

N.L.R.B. v. *Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974) (footnote omitted).[4] In the present case, although the pertinent paragraph of § 16 has been amended twenty-one times since 1933, Congress has done so without disturbing the Comptroller's contemporaneous, restrictive interpretation of the statutory phrase "solely upon the order, and for the account of, customers." This is "persuasive evidence" that the Comptroller's long-standing interpretation is "the one intended by Congress" and that the Comptroller's decision to reverse his interpretation usurps the legislative role properly left to Congress.

In addition to their economic impact on the commercial banking and securities industries, the Comptroller's rulings also have major consequences for the investing public. Because banks were thought to be barred by the Act from dealing in securities, Congress specifically ex-

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aff'd sub nom. Port of New York Authority v. *Baker, Watts & Co.*, 392 F.2d 497 (D.C. Cir. 1968) (selling municipal revenue bonds); *National Retailers Corp.* v. *Valley Nat'l Bk.*, 411 F. Supp. 308 (D. Ariz. 1976) (offering data processing services).

[4] *See also Zemel* v. *Rusk*, 381 U.S. 1 (1965); *Commissioner* v. *Noel Estate*, 380 U.S. 678 (1965); *United States* v. *Leslie Salt Co.*, 350 U.S. 383 (1956); *Helvering* v. *Winmill*, 305 U.S. 79, 83 (1938).

empted them from the definition of "broker" contained in § 3(a)(4) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(4).[5] The comprehensive system of regulation administered by the Securities and Exchange Commission, which protects investors from improper practices on the part of the securities industry, does not protect investors from AIS abuses by national banks. A national bank need not determine the suitability of the stock for the investor, need not disclose adverse information concerning the companies whose stock it buys under AIS, and need not obtain the best available price, the best execution or prompt delivery.

So significant a revision in the respective roles assigned by Congress to the banking and securities industries merits review by this Court.

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[5] *See* Hearings on H.R. 7852 and H.R. 8720 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., at 86 (1934).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1977

Appendices

APPENDIX A

THE ADMINISTRATOR OF NATIONAL BANKS
WASHINGTON, D.C. 20220

[SEAL]

Office of the
Comptroller of the Currency

February 27, 1973

Edward J. McAniff, Esquire
O'Melveny & Myers
611 West Sixth Street
Los Angeles, California 90017

Dear Mr. McAniff:

In your letter of February 12, 1973 you request a ruling on behalf of Security Pacific National Bank that its proposed Automatic Investment Service is consistent with Sections 24 and 378 of Title 12 of the United States Code.

In its essential elements the Service would provide periodic pooled purchases of common stocks ordered from a limited list by and for the account of customers who would authorize regular monthly deductions from their checking accounts for that purpose. The stocks purchased would be held in the name of the bank or its nominee for the account of the customer. Each person acquiring stock would receive a monthly statement indicating the amount designated for purchase, the number of full and fractional shares purchased to four decimal places, the price per share, the date of acquisition and the total shares owned by him.

We have reviewed the provisions of the proposed Service as set forth in your letter and outlined in part above and have concluded that the Service: (1) Involves only

purchases for the account of customers and not for the bank's own account; (2) That the bank in creating and managing the Service is not engaged in the business of issuing, underwriting, selling or distributing securities and (3) That the operation of the Service by the bank is consistent with the provisions of Section 24 and 378 of Title 12, of the United States Code.

Sincerely yours,

/s/ William B. Camp
WILLIAM B. CAMP
Comptroller of the Currency

[SEAL]

THE ADMINISTRATOR OF NATIONAL BANKS
WASHINGTON, D.C. 20220

June 10, 1974

Mr. G. Duane Vieth
Arnold and Porter
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Vieth:

This is in reference to your letter of August 15, 1973, and to the succeeding correspondence and meetings between us on the subject of the Automatic Investment Service (AIS) being offered by some national banks.

In February 1973 counsel for Security Pacific National Bank (Security Pacific) requested the views of this office whether a proposed AIS would be consistent with the national banking laws and particularly with Sections 16 and 21 of the Glass-Steagall Act, 12 U.S.C. Sections 24 and 378, as amended (G-S Act).

Description of AIS

The proposed AIS offers checking account customers of the bank the opportunity to purchase any of an initial list of twenty-five common stocks, by an automatic monthly charge within a range of $20 to $500 to their checking accounts. The participant chooses his stock or stocks from a list of the twenty-five largest corporations listed in Standard and Poor's 425 Industrial Index as determined by the market value of outstanding stock. The bank makes the deductions, effects purchases for the customer's account through a broker, keeps the stock in safekeeping, and provides monthly statements. The bank does not participate in the selection of the stocks to be

included in the list (except insofar as the initial selection of the Standard and Poor's Index was made by the bank) and does not give investment advice to the participants. The participant is advised to make an independent investigation of the merits and suitability of the available stocks.

The bank charges a per transaction fee of 5 percent of the amount invested in each stock, but this fee is limited to $2.00 ($3.00 under some plans). In addition, each participant pays his pro rata share of the brokerage commissions. Participants have full rights as shareholders and receive shareholder material directly from the company.

Those electing to purchase stock have their monthly deductions pooled with money of all others acquiring the same stock under the Service. Periodically, but not less frequently than once every month, the bank establishes a cut-off date and promptly thereafter acquires shares of each of the common stocks with all funds available, after deducting the service charge. The funds include any dividends that have been received by the bank on full and fractional shares that it, or its nominee, is holding in safekeeping for users of AIS. The time between any cut-off date and the subsequent completion by the bank of the acquisition of shares of common stock with funds obtained prior to the cut-off date is referred to as an "acquisition interval." Such acquisition interval shall not exceed thirty days. The price per share (including fractional shares) charged each person who acquires shares of a stock during any particular acquisition interval is the average price (including brokerage costs) paid by the bank for all shares of that stock purchased by it under the Service during that acquisition interval. All the shares acquired under the Service are held in the bank's name or in the name of its nominee but the bank will deliver, upon request, certificates

representing whole shares to the owner. There is no charge for delivery of certificates evidencing ownership of one hundred shares or more. For certificates in the amount of 99 or fewer shares there is a charge of $4 per certificate where the delivery is other than in connection with termination of an account.

A participant may terminate the Service at any time either completely or as to one or more stocks. The bank will deliver certificates representing the full shares owned and cash for fractional shares or will sell the full shares if so requested.

Pertinent Statutes

The provisions of the banking laws applicable to the proposed AIS appear in Title 12 of the United States Code as portions of Sections 24 and 378. The pertinent portion of Section 24 reads as follows:

> The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers and in no case for its own account, and the association shall not underwrite any issue of securities or stock.

Section 378 prohibits persons engaging in the business of issuing underwriting, selling or distributing securities from engaging in the business of receiving demand or time deposits and provides criminal penalties for the violation of any of its provisions. It contains a proviso, however, which states that its provisions shall not prohibit national banks or other banks, financial institutions or private bankers "from dealing in, underwriting, purchasing, and selling investment securities to the extent permitted to national banking associations by the provisions of Section 24 of this title . . ."

The Comptroller reviewed the provisions of the proposed service in the light of the pertinent provisions of Sections 24 and 378 and concluded in a letter dated February 27, 1973 that (1) the AIS involves only purchases for the account of customers and not for the bank's own account; (2) the bank in creating and managing the AIS is not engaged in the business of issuing, underwriting, selling or distributing securities; and (3) the operation of AIS by the bank is consistent with the provisions of Sections 24 and 378 of Title 12 of the United States Code.

Investment Company Institute Request for Reconsideration

On August 15, 1973 counsel for Investment Company Institute (ICI), a national association of the mutual fund industry, requested that the Comptroller reconsider the position taken in the letter of February 27, 1973 and issue a revised opinion or ruling concluding that the operation by a national bank of an AIS which includes a stock purchase plan is prohibited by Sections 24 and 378 of Title 12 of the United States Code. This request was accompanied by a supporting memorandum which mentioned that two banks were operating AIS.

Copies of the request of ICI and of the memoranda were sent by the Comptroller's Office to counsel for the two banks and to counsel for Investment Data Company which had developed the AIS under consideration. Counsel were invited to submit to the Comptroller their comments on the request for reconsideration and to send a copy of any such comments to counsel for ICI. The latter was advised of the invitation.

On October 12, 1973 memoranda in support of the opinion of the Comptroller were received from counsel for the two banks. On October 29, 1973 a reply memorandum was submitted by counsel for ICI. On November

20 a supplemental memorandum responding to certain contentions made in the reply memorandum was submitted by counsel for the banks.

Meanwhile the President of the New York Stock Exchange expressed in a letter of September 7, 1973 the concern of the Exchange with the activities of national banks which were selling stocks listed on the Exchange under AIS. The President of the Exchange requested that the Comptroller's opinion be reviewed in the light of the practices which have developed since it was issued. He was advised that attorneys for ICI had made a similar request supported by a legal memorandum and he was invited to submit any legal briefs or other material he might care to submit in support of his position.

On February 22, 1974 the President of the New York Stock Exchange requested that the Comptroller defer announcing an opinion or ruling until the Exchange had an opportunity to submit additional material. The Comptroller acceded to this request stating in his reply and a press release that he would delay the issuance of his response to ICI until April and requested that the Exchange's material be submitted by March 22. On March 22, 1974 the President of the Exchange submitted a legal memorandum in support of a request that the Comptroller rule that the operation of an AIS by a national bank is unlawful.

Legislative History

Banking Act of 1927

Prior to the enactment of the McFadden Act (1927), 44 Stat. 1226, national banks engaged in the investment securities business under their incidental corporate powers to conduct the banking business. Congress in enacting the McFadden Act chose to recognize, confirm and regulate an existing banking service or business instead

of granting a new power. 69th Cong. 1st Sess. No. 83, January 12, 1926 pp. 2, 3, 4; No. 473 March 25, 1966 pp. 6, 7.

Section 2(b) of the McFadden Act amended the law relating to the corporate powers of national banks by adding at the end of paragraph Seventh of R.S. 5136, 12 U.S.C. 24 in part as follows:

> That the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations . . . commonly known as investment securities under such further definition of the term 'investment securities as may by regulation be prescribed by the Comptroller of the Currency, . . .

Section 2(b) also established a limitation on holdings of the securities of any one obligor of not to exceed 25 percent of the capital and surplus of the bank. That limitation was not to apply however to obligations of the United States, general obligations of any state or of any political subdivision thereof.

Banking Act of 1933

Section 16 of the G-S Act (1933), 48 Stat. 184 again amended the law relating to the corporate powers of national banks by adding as the second sentence of paragraph Seventh the following:

> The business of dealing in investment securities by the association shall be limited to purchasing and selling such securities without recourse, solely upon the order, and for the account of, customers and in no case for its own account, and the association shall not underwrite any issue of securities.

Section 16 also authorized a national bank to purchase investment securities but not shares of stock for its own

account subject to certain limitations and restrictions and ended by providing in pertinent part as follows:

> The limitations and restrictions herein contained as to dealing in, underwriting the purchasing for its own account, investment securities shall not apply to obligations of the United States or general obligations of a state or of any political subdivision thereof. . . .

The legislative reports accompanying the G-S Act have the following comment on the language which later became Section 16.

> National banks are to be permitted to purchase and sell investment securities for their customers to the same extent as heretofore, but hereafter they are to be authorized to purchase and sell such securities for their own account only under such limitations as the Comptroller of the Currency may prescribe, subject to certain definite maximum limits as to amount. 72nd Cong. 1st Sess., Senate Report No. 585, April 22, 1932, p. 15; 73rd Cong. 1st Sess., Senate Report No. 77, May 15, 1933, p. 16; 73rd Cong. 1st Sess., House Report, No. 150, May 19, 1933, p. 3.

Section 16 divided the securities business which banks are authorized to transact into three categories:

(1) Agency—in which the bank may purchase and sell securities, but only as an agent for the account of a customer;

(2) Investment portfolio—in which the bank may purchase for its own account defined investment securities subject to limitations and restrictions, and

(3) Unlimited and unrestricted—in which the bank may deal in, underwrite and purchase for its own ac-

count obligations of the United States and the general obligations of states and municipalities.

Each of these categories, carefully defined in the corporate powers section of the banking law, are by that very fact part of the business of banking which banks may promote and carry on for the purpose of making a profit.

In the agency category the authority of a bank to deal in securities is limited to transactions for customers and not for the account of the bank. As a result, the bank will be unable to make an inventory profit or to suffer an inventory loss on such transactions. Its profit, if any, must come from charges for services performed.

In the other two categories inventory profits and losses are possible but the classes of securities which may be involved are restricted and some of them are subject to other limitations. The reform intended was to reduce the risk that inventory losses in speculative securities might jeopardize the stability of banks and the banking system. The existence of these categories indicates, however, that Congress, in Glass-Steagall, left to banks a definite authority to participate in the securities business.

Section 21(a) of the G-S Act, 48 Stat. 189; 12 U.S.C. 378 made it unlawful (1) for any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor . . . .

Banking Act of 1935

Section 303(a) of the Banking Act of 1935, 49 Stat. 707 added the following proviso at the end of paragraph (1) of subsection (a) of section 21 of the G-S Act:

> Provided, That the provisions of this paragraph shall not prohibit national banks or State banks or trust companies (whether or not members of the Federal Reserve System) or other financial institutions or private bankers from dealing in, underwriting, purchasing, and selling investment securities to the extent permitted to national banking associations by the provisions of section 5136 of the Revised Statutes, as amended (U.S.C., title 12, sec. 24).

The proviso was added to make it clear that Section 21 (a)(1) does not prohibit banks, bankers or financial institutions from engaging in securities activities to the limited extent permitted to national banks under section 5136 of the Revised Statutes. 74th Cong., 1st Sess., H. Rept. No. 742, April 19, 1935, p. 16; S. Rept. No. 10007, May 13, 1935, p. 15.

Section 308(a) of the Banking Act of 1935, 49 Stat. 709, amended the second sentence of paragraph Seventh, R.S. 5136, 12 U.S.C. 24, to read as follows:

> The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customer, and in no case for its own account, and the association shall not underwrite any issue of securities or stock.

The purpose of the amendment was to make clear that national banks and other member banks may purchase and sell stock for the accounts of their customers but not for their own accounts. 74th Cong., 1st Sess., H. Rept. No. 742, p. 18.

The Early Comptroller's Opinions

The Comptroller in a published Interpretive Ruling in 1936, took the position that a bank could not make a profit on its agency business. Since the Act only empowered the Comptroller to make rules concerning the purchase of securities for its own account and not for the account of others, that ruling (like this letter) constituted only an administrative interpretation of statute, and not a legislative regulation.

The office continued to advise national banks to provide agency services at cost until 1948. Paragraph 220 of the *Digest of Opinions* issued that year after reciting the previous rule that the service must be confined to acting as "accommodation agent for the convenience of customers," stated that "accordingly compensation must not *substantially* exceed the aggregate cost of handling of such transactions. . . ." [Underlining supplied.]

In 1953, the Citizens and Southern National Bank of South Carolina wrote the Comptroller and asked whether it could enter into an arrangement with a local stockbroker whereby an individual could arrange to have a set amount taken out of his account once each month and paid to the stockbroker two days later for the purchase of whole shares to be selected by the broker.

The Comptroller replied that there was no objection to the proposed plan, provided that the bank's compensation did not exceed its cost.

This evidently remained the office position until 1957 when the "no-profit" condition was dropped. Paragraph 220A of the August 1957 edition of the *Digest of Opinions* read as follows:

220A. BUYING AND SELLING SECURITIES ON BEHALF OF CUSTOMERS

Although R.S. 5136 prohibits national banks from dealing in securities (except so-called 'exempt' securities) for their own account, it permits them to purchase and sell securities (including stock) for the account of their customers. However, the activities of the bank in this capacity are confined to those of an accommodation agent for the convenience of customers.

In view of the express authorization in R.S. 5136 to purchase and sell securities and stock for the account of customers, a national bank may receive compensation upon the performance of such a service. However, since the bank is acting as an accommodation agent for customers, it may not retain commissions, discounts, or rebates obtained from brokers or dealers unless authorized so to do by the customers for whom it acts as agent.

The transactions permitted by this sentence of R.S. 5136 do not include (a) acting as agent to sell securities which are obligations of the bank's customers, (b) employing solicitors to purchase or sell securities for the bank's customers, or (c) performing services as an active middleman in bringing together borrower or issuer, and lender or purchaser, for a fee or commission. Performance of such functions would amount to engaging in the brokerage or investment banking business, which are beyond the permissible scope of limited accommodation services.

A national bank may not purchase securities for a customer unless payment therefor has been received by the bank, or the customer has credits or collateral with the bank sufficient to cover the trans-

action and the bank is definitely authorized to charge the cost against such credits or collateral. In other words, the bank must not assume any risk in such transactions.

When it purchases or sells securities on behalf of its customer, a national bank should disclose that it is acting as agent and not as principal. Services in this field must be limited to actual customers of the bank—that is, the customer relationship must exist independently of the particular securities transaction.

In 1961 the *Digest of Opinions* was replaced by the Interpretive Rulings section of the *Comptroller's Manual for National Banks.* The *Manual* contained no ruling and continues to contain no ruling on the subject of former paragraph 220A.

The original "no-profit" position apparently stemmed from certain statements made by the Comptroller to Congress in 1934 and 1935 in support of a request for a clarifying amendment to Section 16. Section 16, as first passed in 1933, permitted national banks to purchase and sell "investment securities" for their customers without making clear that this included stocks as well as the debt securities which were permissible "investment securities" for banks' own portfolios. The Comptroller, in asking for the clarifying amendment, stated:

> Section 307(a), which is also new, in part, makes it clear that section 16 of the Banking Act of 1933 was not intended to prohibit national banks or member banks from buying or selling stocks solely for the account of their customers and as an accommodation thereto and not for their own account.
>
> This is extremely important, particulary in communities remote from financial centers, and since there is involved no investment by the bank of its own funds, no objection can be seen thereto. The amendment further limits national banks in purchasing investment securities for their own account . . . ." *Hearings on H.R. 5357 Before the House Committee on Banking and Currency,* 74th Cong., 1st Sess. 663 (1935).

The requested amendment was made in 1935 and expressly authorized agency dealings in stocks as well as bonds. The pertinent amendment reads as follows, with deleted material in square brackets and added material underscored:

> The business of dealing in [investments] securities *and stock* by the association shall be limited to purchasing and selling such securities *and stock* without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities *or stock*: *Provided,* That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe . . . ." H.R. Rep. No. 742, 74th Cong., 1st Sess. 65 (1935).

The sole purpose of the amendment was described in a single sentence in the House Report accompanying the bill which so amended Section 16 in 1935:

> SECTION 307(b). PURCHASE OF STOCK FOR ACCOUNT OF CUSTOMERS
>
> Section 307(b) would amend section 5136 of the Revised Statutes so as to make it clear that national banks and other member banks may purchase and sell stocks for the account of their customers but not for their own accounts. H.R. Rep. No. 742, 74th Cong., 1st Sess. 18 (1935).

In its Annual Report covering the year 1935, the Federal Reserve Board's entire comment on the amending legislation reads as follows:

> Purchase of stocks for account of customers.—It was made clear, in conformity with previous rulings of the Comptroller of the Currency and the Board, that national and other member banks may purchase and sell stocks for the account of their customers but not for their own accounts. 1935 Annual Report of the Board of Governors of the Federal Reserve System 56 (1936).

The office position from 1936 to 1957 was that it was inconsistent with the idea of an "accommodation" service for a bank to make a profit on such service. These old rulings did not reveal the rationale for concluding that a bank service, expressly authorized by Congress, could not be marketed in the usual fashion. This view, like many others expressed by bank regulators, in the immediate post-depression decades, was designed to be ultra-conservative and to confine banks as narrowly as possible in their activities. However, in this regard, the office apparently went further in the direction of conservatism than did the Congress, since neither the word nor the idea of the "accommodation" limitation appears in the statute or in any committee or floor comments. Even if we assume that the Congress, in responding to the 1934 and 1935 Comptroller recommendations using the word "accommodation," adopted the concept, nowhere in either the Comptroller's recommendations or in the Committee reports is there any indication that "accommodation" meant "no profit" or "at cost." That idea came later probably as part of the tendency of the Comptroller's office in those years to limit various bank activities by restricting advertising or charges.

By August 1957, enough water had apparently flowed over the dam to permit a Deputy Comptroller to advise a banker as follows:

> Mr. Duane R. Zimmerman
> Assistant Cashier
> The First National Bank
> Mainelander, Wisconsin
>
> Dear Mr. Zimmerman:
>
> This is to advise in reply to your letter of August 1, 1957, concerning service charges for the purchase or sale of stocks and bonds for the account of customers, that adoption of the proposed schedule of charges for such services, as outlined in your letter, is a matter for determination by the Board of Directors of your bank.
>
> Very truly yours,
>
> L. A. Jennings
> Deputy Comptroller of the Currency

A pertinent inquiry in determining whether Congress envisioned the imposition of charges by banks in performing agency transactions is whether such charges were imposed prior to 1933, inasmuch as Section 16 was intended to preserve the practice "as heretofore." Cases cited by bank counsel and the records of the office indicate that such charges were commonplace before the Act and continued to be made thereafter. An S.E.C. study in 1963 described the practice as follows:

> Also participating in the third market as intermediaries for public customers are commercial banks representing individuals with whom the bank enjoys only an agency relationship. A NYSE transaction study in 1955 reported 20.4 percent of commercial bank share volume on the Exchange was of

this type. A leading market maker, doing a considerable volume of business with commercial banks, expressed the opinion to the study that approximately the same portion of bank volume on the third market today consists of this type of transactions.

The banks appear to charge from $5.00 per transaction to, in some cases, the full NYSE minimum commission charge *plus* a small transaction charge. The Special Study made no exhaustive study of the matter and obtained details on such charges from only a few banks. It found that one large metropolitan bank charges its custodial and investment advisory accounts on each security transaction, wherever executed, an activity fee of $2.50, and on each over-the-counter principal transaction, including third market transactions, an additional special charge equal to the NYSE minimum commission. This bank states it trades on the third market only when it can secure a price equal to the last sale on the NYSE. *Report of Special Study of Securities Markets of the Securities and Exchange Commission*, H.R. Doc. No. 95, Pt. 2, 88th Cong., 1st Sess., 884-885 (1963).

The "New Security" Argument

The Exchange (but not ICI) makes the argument that AIS somehow involves the bank in the issuance of a separate "security" distinct from the underlying stock. The argument is that during the "Acquisition Interval" the purchaser has an undivided interest in the pooled purchase funds and an interest in an undetermined number of shares of a specific stock to be purchased. These "interests" are said to constitute a "security" which the bank is merchandising, contrary to the provisions of Section 21 of the G-S Act, 12 U.S.C. § 378, as interpreted by the Supreme Court in *ICI* v. *Camp*, 401 U.S. 617 (1971).

We cannot agree that *ICI* v. *Camp* covers the facts in this case. There are more differences than similarities between the two fact patterns.

In *Camp* the customer bought a "unit of participation" which represented a proportionate interest in a collective group of assets (the Fund). The Fund was registered as an investment company under the Investment Company Act of 1940 and the units of participation were registered as securities pursuant to the Securities Act of 1933. The Fund was supervised by a five-member committee elected annually by the participants pursuant to the Investment Company Act of 1940. The actual custody and investment of fund assets were carried out by the bank as investment advisor pursuant to an agreement with the Fund.

The court found that this structure was similar to a mutual fund and that therefore the "units of participation" were legally similar to "securities" which a bank could not market without violating Section 21 of the G-S Act.

None of the characteristics of the Fund in *Camp* are present in AIS. There is no separate fund or entity which requires registration under the Investment Company Act of 1940. Since there is no separate "fund," there can be no separate "security" being issued by the "fund." There is no management committee because there is nothing to manage. There is no investment advisory arrangements or fees for the same reason. There are no separate "securities" to register under the 1933 Act. These conclusions have been tacitly confirmed by the SEC staff since they have issued "no-action" letters with respect to AIS and similar plans.

The only "securities" involved in AIS are the shares of the twenty-five issuers. These shares are purchased by the bank as agent pursuant to the permission granted in

Section 16 of the G-S Act and are not sold or underwritten in violation of Section 21 of the G-S Act.

The Exchange argues that the customer's interest in the uninvested funds during the "acquisition interval" constitutes a separate "security" and that the customer's interest in fractions of shares credited to his account may constitute a "separate security."

We think these are strained constructions of the applicable acts. The customers' interests in uninvested cash and fractional shares are mere book entries, incidental to the main agency transactions. Our view is evidently shared by others in the securities business, since the New York Stock Exchange's own Monthly Investment Plan, Merrill Lynch's Shareholder Plan, and Putnam's VIP Plan all credit fractional shares to participants' accounts, without being considered as mutual funds.

Opinion

The words of the statute, taken in their ordinary meaning, clearly permit member banks to purchase and sell stock as agent for customers. We do not think it makes any difference whether the customer accumulates the money to make a purchase outside the bank or within the bank pursuant to an AIS. The principle of the AIS is not new. Many banks in years past have entered into arrangements with customers or brokers whereby the customer would make systematic payments toward stock purchases. The essentially new thing about AIS is the use of a computer to keep track of the customer's account.

The ICI brief recognizes that Section 16 permits agency transactions, but maintains strongly that the permission covers only customer-initiated transactions carried out by the bank at its cost or below. ICI strongly contends that Congress did not intend for banks to promote agency services with the hope of making a profit. According to

the volume of sales reported in response to the Patman questionnaire, it appears unlikely that any bank to date has in fact made any profit on its AIS. However, our February 1973 opinion was not limited to at-cost service, and the discussion herein assumes that the banks hope and intend to ultimately make a profit on AIS.

There is no doubt that the earlier position of this office supported the view of ICI. These opinions covered the period from 1935 through 1957 and are discussed in detail above. These opinions understandably reflected the great caution of banking regulations in the years immediately following the 1931-2 debacle. By 1957, the office had recognized that fundamental changes in the economic and regulatory structure had made it safe for banks to expand somewhat the scope of their activities. In 1974 there can be no doubt that banks can and should offer many new valuable financial services to the public, without jeopardizing the safety of depositors.

There is no doubt that a national bank, like any business corporation, is authorized by law to make a profit on any part of its authorized business.

The ICI objects to the advertising of AIS and argues that it is inconsistent with the concept of an "accommodation" service stressed by the office in the pre-1957 opinions. As stated above, the "accommodation" concept is not contained in the statute and we now believe the pre-1957 office opinions to be erroneous.

Secondly, there is no necessary inconsistency between a service being at the same time an "accommodation" for customers and a service of potential profit for the provider. Various service industries commonly advertise the extent to which they go to "accommodate" their customers, with no connotation of profitless activity.

Finally, the U. S. Supreme Court has held that a national bank may advertise any service it may legally

provide, even in the face of a state statute which apparently prohibited state-chartered banks from advertising such service. *Franklin National Bank of New York*, 347 U.S. 373 (1954).

Policy Considerations

1. *Potential Abuses*

The ICI and New York Stock Exchange suggest a number of potential abuses which they believe could arise out of the operation by banks of AIS. The questions asked by Chairman Patman in his February 1, 1974 letter also suggest such possibilities. Since our opinion is that Section 16 on its face clearly and unambiguously permits AIS service, such considerations are matters more relevant to future supervisory vigilance than to the statutory interpretation which is the subject of this letter. Since it is argued, however, that some of these potential abuses may have been in the minds of the framers of the G-S Act, we have considered each suggested problem.

A. *Impairment of bank's ability to give disinterested investment advice.*

ICI argues that:

> A bank which is aggressively promoting a stock-buying service can hardly be expected to render disinterested investment advice to potential purchasers of corporate stocks, particularly when the bank will profit by inducing such a customer to participate in the bank's plan.

This contention does not withstand analysis. One of the salient features of the AIS is that the bank expressly disclaims any responsibility for the purchaser's investment decisions. In fact the SEC staff, as a condition to issuing a "no action" letter to Security Pacific required that the brochure make clear that the bank was making

no recommendations as to the suitability of any investment. It is true that the customer must choose from the twenty-five largest corporations by market value of outstanding stock listed in Standard and Poor's 423 Industrial Index, but this general guidance could hardly be argued to constitute "investment advice" as that term is generally used. The use of the Standard and Poor's Index certainly provides as much assurance against partiality as one could reasonably expect. The fact that the bank does not purport to give any investment advice to the AIS customer is carefully made express in the promotional literature as well as the contracts.

Contrary to the ICI "disinterested advice" contention, one of the strongest points in favor of AIS, is that it provides a convenient means within reach of the many bank customers who cannot afford individual trust department or brokerage services to participate in equity investment with a minimum of risk of loss due to agent insolvency.

B. *Bank will be tempted to make unsound loans to companies on the AIS list.*

The ICI, in its brief, argues that the AIS should be prohibited because banks would be tempted to make unsound loans to companies on the AIS list. We do not find this persuasive for the following reasons:

First, the periodic examination process is sufficient to detect such a pattern of lending and to prevent its recurrence. Secondly, the argument proves too much since its acceptence [sic] would proscribe commercial side lending to any corporation, recommended for investment purposes, by the trust department. While a few have recommended such complete divorcement, the weight of regulatory opinion is that the probability of abuse can be obviated by the examination process and enforcement of existing trust law. In this regard the office has recently

published for comment a proposed regulation which would establish policies to prevent improper use of insider information to affect investment decisions. *Federal Register*, April 24, 1974.

Thirdly, there would not be any reason for a bank to unduly favor an issuer on the AIS list since the bank undertakes no responsibility for the performance of AIS stocks and cannot be blamed or credited for such performance.

C. *Bank competition from AIS will harm or destroy nonbank dealers.*

The principal purpose of the G-S Act was to protect the solvency of banks. See *Russell* v. *Continental Illinois Bank and Trust Co.*, 479 F.2d 131, 133-134 (7th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3306 (U.S. Nov. 20, 1973). It was not to protect securities dealers from competition.

Even if this were a valid consideration, there is no reason to believe that nonbank dealers cannot compete with banks in offering AIS plans. In fact similar plans are now being offered by some member brokers of the New York Stock Exchange under its monthly investment plan, F. L. Putman & Co. under the name "Voluntary Investment Plan" ("VIP") and by another brokerage house under the name "Personalized Investment Plan" ("PIP"). See CCH Fed. Sec. L. Rep. 1972-1973, Dec. #78,850.

AIS appears to be an imaginative way to enable persons with modest incomes to systematically invest in stocks. Because of the rigidities of their fee structure and for other reasons, small purchasers have been discouraged from using stock brokers, despite tremendous promotional efforts.

We believe that it is definitely in the public interest for banks to attempt to tap new markets for capital securities. In the long run, banks and nonbank dealers alike will benefit by the broadening of markets. The AIS customer is not likely to be taken from the odd-lot whole share customers of the regular broker. If anything, the movement is likely to be the other way. The participant whose interest in the market is awakened by AIS, is more likely to graduate to whole shares and the prestige of having his own "stockbroker."

D. *The operation of AIS raises potential conflicts of interest, most significantly between the bank and its AIS investors.*

The New York Stock Exchange emphasizes this contention and Chairman Patman's questions also are directed at this possibility.

The Exchange argues that the bank may overly extend the time between deposit and purchase, in order to get the benefit of the "float." However, an examination of the AIS plan documents reveals that this "acquisition interval" cannot exceed thirty days and is fully disclosed to the customer. The operation of the "acquisition interval" is described above under "Description of AIS." The procedure set forth appears adequate to protect against abuse of the "float." There will also be the safeguard of the regular trust examiner's inspection. Possible abuse of "float" is a standard item on examiner's check lists and AIS presents no unique problems in this regard.

Another alleged conflict concerns the timing of buy and sell orders between AIS and other trusts administered by the bank. What if AIS customers are buying stocks which the bank as trustee is selling?

The problem is not in any way unique to AIS. Any agent, whether bank or broker, constantly handles buy

and sell orders for different principals, sometimes simultaneously. The position of the AIS bank is very similar to that of a broker who also acts as investment advisor to a mutual fund. The broker may be advising the fund to sell stock, while at the same time executing orders from customers to buy stock. As long as no party is acting on inside information, not publicly available, the situation does not violate any rules.

Of course there cannot be any transactions directly between the AIS and trust accounts in the bank, and the answers to the Patman questionnaire indicate that no AIS bank permits this.

E. *AIS customers will not enjoy the protection of SIPC.*

The Exchange contention that lack of coverage under the Securities Investor Protection Act of 1970 (SIPC) will disadvantage AIS customers is without merit. The actuarial risk of loss through agent insolvency is greater where the agent is a nonbank than where it is a bank. Assuming that the Exchange reference is to the comparative legal position of claimants against an insolvent agent, the bank customer probably fares better. The $50,000 SIPC protection is broken down to $20,000 of protection for cash and up to $30,000 additional for securities in the custody of the broker. The AIS customer will have his uninvested cash in a deposit account covered by FDIC insurance to $20,000. Legislation is now pending which would increase such coverage. His invested money will be represented by identifiable shares which as trust assets will definitely not be part of the estate of the insolvent bank. Banks are not permitted to pledge or otherwise use customer securities in any way, as are broker-dealers in some circumstances. There is therefore little likelihood of conflicting claims against such assets in case of bank insolvency, whereas customers' securities have been lost or contested in broker insolvencies.

F. *The AIS investors are deprived of safeguards provided to other investors by the Federal Securities Laws.*

The contention has been made strongly by the securities industry that AIS customers are denied the benefit of many important statutory protections because banks are exempt from certain laws applicable to nonbank brokers.

We conclude that, based on past experience, the risk of loss to customers due to agent dishonesty or insolvency is probably greater where the agent is a nonbank than where the agent is a bank, despite the fact that banks are exempt from some SEC regulation. The ICI and Securities and Exchange contention overlooks the fact that banks are subject to their own body of law and regulation, different but certainly no less strict than broker regulation. Every national bank, by law (12 U.S.C. § 481) is subject to exhaustive examination twice in each calendar year (unless one examination in a two year period is waived by the Comptroller). In addition the trust department is subject to a separate examination once a year.

Every national bank must make at least four reports of condition to the Comptroller disclosing in detail its resources and liabilities, and such other reports as the Comptroller shall request. 12 U.S.C. §§ 161, 164.

Funds deducted from checking accounts and awaiting investment under AIS are deposited in special accounts which are eligible for FDIC insurance protection. 12 U.S.C. § 1813(1)(3) and (m).

Securities held for AIS customers are segregated, do not constitute assets of the bank, and will not be subject to any prior claims in case of bankruptcy. Banks are also required to take specific security precautions with respect to cash and securities, including securities devices, procedures, and reports to the Comptroller with

respect thereto. 12 U.S.C. §§ 1881-1884; 12 C.F.R. Part 21.

Whenever the appropriate federal banking agency is of the opinion that an insured bank has or is about to engage in an unsafe or unsound practice in conducting the business of such bank or is violating or has violated an applicable law, rule, or regulation, such bank, subject to certain procedural requirements, may be terminated as an FDIC insured bank, a cease-and-desist order may issue, and/or appropriate directors or officers involved may be suspended or removed. 12 U.S.C. § 1818; 12 C.F.R. § 19.1, *et seq.*

The ICI and Exchange briefs are not very specific or persuasive on what securities law safeguards the AIS customer will lack. Mentioned are:

(1) The lack of a "know your customer" or "suitability" requirement.

We are not convinced that these requirements are very meaningful in actual broker practice. In any event the imposition of such tests is not appropriate to the AIS situation where the agent expressly and clearly disavows any role in the customer's selection process.

(2) Disclosure requirements of the 1933 and 1934 Acts.

The Exchange brief does not spell out what protections of these acts are denied AIS customers. The AIS customer is in the same position with regard to these statutes, as he would be if he were dealing with a broker. The registration, reporting, proxy and prospectus requirements of both acts apply fully to the *issuers* of the securities the AIS customer selects and he will have as much access to such information as a purchaser from a broker. In addition, the important antifraud provisions of these laws apply to banks as well as nonbanks.

This office recently published a proposed set of regulations which will require national banks with major trust business to disclose their holdings and significant transactions in trust assets. These same regulations will prohibit the use of nonpublic information in making trust department decisions. *Federal Register*, April 24, 1974. Contrary to the Exchange argument, the pending regulations will provide national bank AIS investors with disclosures about their fiduciary not generally available to broker-dealer customers.

Potential Benefits

We believe that AIS could, if accepted by the public, constitute a significant improvement in the capital marketing mechanism of this country. It provides a means by which the small investor can obtain maximum benefit from the economies of automation. It is appropriate that banks should provide this service since it is merely an extension of the traditional agency services provided for well-to-to investors. It will undoubtedly appeal to many people who have never invested in stock before and, thus to the extent it is successful, provide new sources of capital which are badly needed.

The expansion of AIS will be a pro-competitive force in a business which has been criticized for unduly rigid pricing patterns and restrictions to entry. We believe such competition will be constructive and not destructive of nonbank competitors. There is no obstacle to brokers offering AIS and in fact the first plans were offered by brokers. It is very possible that in years to come the brokers will find that the entry of banks into AIS broadened interest in the securities market to the great advantage of all competitive suppliers in it. This has been the result in some other fields which banks have entered in recent years such as equipment leasing.

We do not believe that the mere possibility that conflicts of interest or other suggested abuses might occur

provides a sufficient regulatory reason to abort in its infancy a legal activity with as much promise for public benefits as AIS. The mere potential for conflicts of interest exists in banking just as it does in virtually every business endeavor. It is no more reasonable to assume that banks will violate the laws, regulations and policies which govern their conduct than it is to assume that brokerage houses will do so. There are numerous opportunities for conflicts of interest to arise in such brokerage firms where research, underwriting and merchandizing often occur "under one roof" and in smaller houses, even under the supervision of one person.

While such potential conflicts of interest deserve examination, unless there is actual or immediate threatened abuse, regulatory prohibitions are not justified. We are not unmindful of the potential for abuse, but until such time as abuse develops, we should not strain the meaning of 12 U.S.C. § 24 to stifle banks' competition in the free market for the patronage of American investors.

Conclusion

The clear wording of the G-S Act permits banks to offer the Automated Investment Service to their customers. There is nothing in the Act which implies that banks cannot commercially promote any service which they may lawfully provide. The interests of the public will be served better by having this service available than not, and there is no reason to believe that the securities industry will be damaged thereby. It appears more likely that the development of AIS will make significant positive contributions to the capital markets and to the securities business generally. For these reasons, we affirm the conclusions contained in our February 27, 1973, letter to Security Pacific National Bank.

Sincerely,

/s/ James E. Smith
JAMES E. SMITH
Comptroller of the Currency

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1405

[Filed Dec. 5, 1975]

NEW YORK STOCK EXCHANGE, INC.,

and

INVESTMENT COMPANY INSTITUTE,
Plaintiffs,

v.

JAMES E. SMITH, Comptroller of the Currency,
The Department of the Treasury,
Defendant.

MEMORANDUM OPINION

Plaintiffs seek a judgment declaring invalid a ruling of the Comptroller of the Currency holding that automatic stock purchasing services offered by national banks do not violate sections 16 and 21 of the Glass-Steagall Act, 12 U.S.C. §§ 24, 378 (1970). The matter is now before the court on cross motions for summary judgment, pursuant to rule 56 of the Federal Rules of Civil Procedure. Defendant also urges that the case be dismissed on the grounds that plaintiffs lack standing to sue, the ruling in question is not reviewable, and necessary parties have not been joined. The court finds that plaintiffs have satisfied all threshold requirements, but that defendant is entitled to summary judgment on the merits.

I

This action is brought by the New York Stock Exchange (NYSE), a national securities exchange, and the Investment Company Institute (ICI), an association of open-end investment companies and their investment advisors and principal underwriters. Defendant James E. Smith, the Comptroller of the Currency, is responsible for the supervision and regulation of the national banking system. On June 10, 1974, he issued an opinion letter stating that sections 16 and 21 of the Glass-Steagall Act do not prohibit national banks from offering customers automatic stock purchasing services.

The plan approved in the Comptroller's letter, called Automatic Investment Service (AIS), permits checking account customers to designate a sum of money between $20 and $500 to be deducted automatically from their account each month and invested in one of 25 selected securities. The 25 stocks available are those having the highest aggregate market value of outstanding stock on Standard & Poor's 425 Industrial Index. Advertising brochures and the contracts between AIS customers and their banks state that the banks make no recommendation as to the merits of any individual stock or to the group of stocks as a whole. The plans are extensively advertised, however, and the stocks are often referred to as "bluechip."

When an AIS customer orders a stock, the bank has 30 days in which to complete the transaction. The bank does not promise to obtain the best possible price during the 30 days, only to execute the order before the end of that period. Until it purchases the securities ordered, the bank holds the customer's money in a common AIS account, interest free. The actual price charged against the customer's account is the average price paid by the bank for all shares of the same stock bought during the

30 days, plus a pro rata share of the broker's commissions and a service charge.[1] When the amount designated for investment will not purchase an additional whole share at the average price, the customer is credited with a fractional share. Because all purchases of a single security are aggregated, no single purchase can be identified as being made for any particular customer.

Stocks purchased under AIS are held in the name of the purchasing bank, but the customer has full beneficial ownership. The customer can vote the shares and will directly receive any dividends paid on them. A customer can withdraw from the plan at any time and receive his stock certificates or their cash value. If a customer wishes to sell only a portion of his holdings, the bank will also execute the transaction for him. When holdings acquired under AIS are liquidated, the bank will often "cross" the sell order with a buy order from another AIS customer. Internal crosses allow the bank to avoid paying a broker's fee on the transactions and ensure that the money will not be needed for the full 30 days.

The letter of June 10, 1974, numbered 27 pages in length and represented the culmination of a substantial deliberative effort by the Comptroller. Consideration of AIS began on October 30, 1972, when the Security Pacific National Bank requested the Comptroller's opinion of the plan's legality. Following the issuance of a letter approving AIS, both ICI and NYSE requested the Comptroller to reconsider his position. Briefs exploring the legal merits of AIS were submitted by NYSE, ICI, and several national banks. After reviewing these documents,

[1] A major attraction of the plan for small investors is that the total cost of a transaction, including the bank's fee, is lower than that the customer would incur if he went to a broker since the bank can take advantage of the lower commission rates charged on large orders.

which contained virtually all the arguments presented by the parties now before the court, the Comptroller issued the June 10 letter.

II

Defendant urges upon the court several preliminary arguments which, if correct, would prevent adjudication of the merits of plaintiffs' complaint. Specifically, defendant contends that plaintiffs lack standing, that the letter in issue is not a reviewable agency action and, consequently, no justiciable case or controversy exists, and that plaintiffs have failed to join indispensable parties. The court finds no merit in any of these contentions.

Defendant's first argument is that plaintiffs lack standing to bring this suit.[2] That the plaintiffs have standing to sue was conclusively established by the Supreme Court in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), and *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971). In *Data Processing*, the Court held that competitors of businesses aided by agency action suffered sufficient injury to effectively challenge that action. The Court also found that Congress, when passing the Glass-Steagall Act, arguably intended to protect nonregulated parties from competition by national banks. In *Investment Company Institute*, which concerned the operation of investment funds by national banks, the Court held that one of the very plaintiffs in the instant case was arguably within the zone of protection carved out by the Glass-Steagall Act.

[2] Defendant, while contending that neither plaintiff has standing, has moved to dismiss only against NYSE. The reason stated by defendant for this distinction is that he can prove lack of injury to ICI's members only after discovery. ICI alleges competitive injury to its members in the complaint, however, and the court finds the two plaintiffs impossible to separate.

The potential competitive injury to NYSE and ICI in the case at bar is indistinguishable from that suffered by ICI in *Investment Company Institute*. Defendant's argument that NYSE and ICI actually benefit from the operation of AIS because it attracts new investors to the market lacks substance. If plaintiffs did not feel substantially threatened by AIS, they would not have undertaken this burdensome litigation.

A more substantial issue raised by defendant is the power of the court to review the opinion letter in question. Defendant submits that the opinion letter is not subject to review under section 10 of the Administrative Procedure Act, 5 U.S.C. § 704 (1970), because it is not legally binding on any party or the Comptroller's Office and because the plaintiffs conduct is not directly affected by the Comptroller's interpretation of the statute.[3]

The propriety of reviewing a statutory interpretation by an agency responsible for administering the act has been explored at length by the Supreme Court in *Abbott Laboratories, Inc.* v. *Gardner*, 387 U.S. 136 (1967), and by the Court of Appeals for the District of Columbia Circuit in *National Automatic Laundry and Cleaning Council* v. *Shultz*, 443 F.2d 689 (D.C. Cir. 1971) and *Continental Air Lines, Inc.* v. *CAB*, 522 F.2d 107 (D.C. Cir. 1975) (en banc). *Abbott Laboratories* established that in deciding whether an agency ruling is ripe for judicial review a court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 148-49. Further, doubt as to justiciability must be resolved in favor of the plaintiff since

[3] *Investment Company Institute* v. *Camp* involved an attack upon a regulation promulgated by the Comptroller rather than upon an opinion letter by the Comptroller and, thus, does not control the issue of justiciability in the case at bar. *See* 401 U.S. at 619-20.

the Administrative Procedure Act "embodies the basic presumption of judicial review. . . ." *Id.* at 140.

The fitness of a particular ruling for judicial review depends upon its finality and the court's ability to discern and resolve the legal issues the ruling presents. *See Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 162-63 (1967); *National Automatic Laundry and Cleaning Council* v. *Shultz*, *supra*, at 694. An opinion letter signed by the head of an agency, not indicating on its face that it is tentative, and growing out of substantial deliberation is "presumptively final" for purposes of judicial review. *National Automatic Laundry and Cleaning Council* v. *Shultz*, *supra*, at 701-02. This is so even though the opinion legally could be reconsidered by the agency at any time. Thus, in *Continental Air Lines* the court of appeals reviewed the merits of a CAB order which was not legally binding on the agency. *See* 522 F.2d at 123, 124-25. The agency action reviewed in *NALCC* similarly did not bind the agency, and, in fact, was an opinion letter interpreting a portion of the statute administered by the agency. *See* 443 F.2d at 692, 702. Opinion letters signed by an agency head are also "presumptively final" even though they have no legal effect on parties subject to agency regulation; the opinion need only affect those subject to regulation and their competitors as a practical matter. *See Continental Air Lines, Inc.* v. *CAB*, *supra*, at 124-25, *citing Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963). In the instant case, the opinion letter is signed by the agency head, shows no indication of being tentative, follows substantial deliberation, and, as a practical matter, encourages national banks to institute AIS programs. It thus appears that the letter is sufficiently final to permit judicial review of its merits.

The letter in issue is also fit for judicial review in all other respects since the court can discern and resolve the legal issues involved. The principal factor con-

sidered in judging this aspect of an action's fitness for review is whether the case turns on a "purely legal" question. *See Abbott Laboratories, Inc.* v. *Gardner, supra,* at 149; *Continental Air Lines, Inc.* v. *CAB, supra,* at 126; *National Automatic Laundry and Cleaning Council* v. *Shultz, supra,* at 695. There is no doubt that the case at bar presents a "purely legal" question only, the validity of the Comptroller's construction of the Glass-Steagall Act. Further, it is a legal question properly before this court since the Supreme Court has stated that Congress did not intend to preclude judicial review of actions taken by the Comptroller in furtherance of his obligations under the Act. *See Investment Company Institute* v. *Camp, supra,* at 620; *Association of Data Processing Service Organizations, Inc.* v. *Camp, supra,* at 157.

Considering the second prong of the test set out in *Abbott Laboratories*, the court finds that the plaintiffs will suffer substantial hardship if the court withholds consideration of the Comptroller's letter at this time. National banks are presently offering AIS to customers as a direct result of the Comptroller's ruling, thereby injuring the plaintiffs who, heretofore, were free of bank competition in the securities field. Defendant argues that plaintiffs are not directly subject to regulation by the Comptroller and thus are not facing the dilemma of obeying a questionable ruling or accepting the consequences of violating it. This, of course, was precisely the position of the plaintiffs in *Continental Air Lines* and *NALCC* and it was because the plaintiffs faced such a dilemma that the courts in those cases determined that withholding review would cause hardship. *See* 522 F.2d at 126; 443 F.2d at 696. The plaintiffs in *Continental Air Lines* and *NALCC* faced a "Hobson's choice" for a simple reason, they were adversely affected by the agency action. The position of plaintiffs in the case at

bar is the other side of this coin. The agency action benefited those directly regulated by the statute; only non-regulated parties, like the plaintiffs are hurt by the Comptroller's letter and, consequently, only non-regulated parties would seek to challenge the letter. Prohibiting review in this case because plaintiffs are not faced with the prospect of having to disobey a regulation would undermine the Supreme Court's holding in *Data Processing* that competitors of parties directly affected by agency action have standing to challenge such action. Indeed, the need for review is even stronger in the instant case than it was in *Continental Air Lines* or *NALCC* since the agency actions attacked in *Continental* and *NALCC* would come under judicial scrutiny when a party chose to disobey the agency, but the action attacked by plaintiffs here will never come under review if this case is dismissed.

Having examined the Comptroller's letter here under attack in light of the principles set forth in *Abbott Laboratories, NALCC,* and *Continental Air Lines,* the court is convinced that judicial review is appropriate. The factors justifying review in the instant case are well summarized by the following passage from *NALCC*:

> When a general, interpretative ruling signed by the head of an agency has been crystalized following reflective examination in the course of the agency's interpretative process, and is accordingly entitled to deference not only as a matter of fact from staff and citizenry expected to conform but also as a matter of law from a court reviewing the question, there coexist both multiple signposts of authoritative determination, finality and ripeness, and a concomitant indication that the resultant pointing toward prompt judicial review will benefit the total administrative process by resolving uncertainties without intolerable burden or disruption.

443 F.2d at 702.

Defendant's third preliminary argument, that indispensable parties have not been joined, is really no more than a reformulation of the reviewability argument. Defendant reasons that since the letter in question is merely advisory, the court can grant meaningful relief only if the banks now offering AIS are before it. The court can, however, order the Comptroller to revoke or modify his interpretation of the statute and such relief would have a significant practical, if not legal, impact on the use of AIS. In *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770 (D.D.C. 1959), *aff'd*, 278 F.2d 871 (D.C. Cir. 1960), the court expressly held that a party challenging the action of the Comptroller taken pursuant to the Glass-Steagall Act need not join the national bank directly affected by the ruling under attack. Since the court can review the Comptroller's decision in the case at bar, no other party's presence is required.

III

The principal substantive issue presented by this litigation is whether the Comptroller properly construed the Glass-Steagall Act as permitting national banks to purchase securities for their customers on a continuous and wide-spread basis. Section 16 of the Act provides, in relevant part,

> The business of dealing in securities and stock by [a national bank] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and [a national bank] shall not underwrite any issue of securities or stock. . . .

12 U.S.C. § 24 (1970). Section 21 of the Act provides that conduct exceeding the limits set out in section 16 shall be illegal.[4]

[4] Section 21 provides:

> (a) After the expiration of one year after June 16, 1933, it shall be unlawful—
>
> (1) For any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor: Provided, That the provisions of this paragraph shall not prohibit national banks . . . from dealing in, underwriting, purchasing and selling investment securities, or issuing securities to the extent permitted . . . by section 24 of this title. . . .

12 U.S.C. § 378(a) (1970).

At the outset, the court notes that it gives "great weight" to the Comptroller's ruling. *Investment Company Institute* v. *Camp*, 401 U.S. 617, 626-27 (1971). The Supreme Court has consistently held that reasonable constructions of regulatory statutes by the agencies charged with enforcement of those statutes are to be respected by reviewing courts. *See, e.g., Investment Company Institute* v. *Camp, supra*; *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Unlike *Investment Company Institute*, where the Comptroller promulgated a controversial regulation without opinion or accompanying statement, this court has the benefit of a comprehensive and well-reasoned explanation of his ruling by the Comptroller. The various briefs submitted to the Comptroller at his request presented most of the arguments and legal theories advanced by the plaintiffs before this court, and the Comptroller's rejection of these arguments will be respected, even if the court would have reached a different result were this a question of first impression. *See Udall* v. *Tallman, supra.*

An analysis of the legal issues involved in the Comptroller's construction of the Glass-Steagall Act indicates that his final opinion was eminently reasonable. Cer-

tainly the language of section 16, when read literally, supports the Comptroller's construction of the Act. Section 16 permits national banks to purchase and sell securities if (1) the bank acts as agent for a customer, (2) the transactions are without recourse, (3) the transactions are initiated solely upon the order of the customer, and (4) the transactions are for the account of the customer and not for the bank's account. AIS conforms to this language since (1) participants must be checking account customers of the bank, (2) the bank makes no warranty as to the quality of the investment, (3) no sales or purchases are executed unless directed by the customer, and (4) the customer has full beneficial ownership of the securities.

Although AIS appears to meet the letter of the Glass-Steagall Act, plaintiffs argue forcefully that it fails to meet the Act's spirit. Plaintiffs contend that in carving out this narrow exception to the general ban on participation in securities-related activities by national banks, Congress never intended to authorize a large-scale, computerized service. Further, plaintiffs note that certain bank brochures advertising AIS inform prospective participants that checking accounts are free, thus rendering compliance with the statutory requirement of a customer relationship highly technical. In short, plaintiffs assert that Congress granted the banks narrow authority to continue a service provided to established customers as a courtesy, but that AIS far exceeds this authority insofar as it is used to attract customers to banks in the first place.

Plaintiffs' interpretation of the Act is supported by early opinions of the Comptroller, which construed section 16 as allowing banks to purchase and sell stocks for customers' accounts only where the service was an "accommodation", the customer relationship existed independently of the service, the bank did not engage in the brokerage business, and the bank made no profit on the

transactions. *See* 1 *Bulletin of the Comptroller of the Currency*, No. 2, Oct. 26, 1935, at 2-3 (summary of previous interpretations). While administrative interpretations of a statute made contemporaneously with its enactment are often relied upon by courts in resolving ambiguity as to legislative intent, *NLRB* v. *Bell Aerospace*, 416 U.S. 267 (1974); *National Lead Company* v. *United States*, 252 U.S. 140 (1920), such interpretations are always subject to revision. In fact, a 1957 interpretation issued by the Comptroller removed the prohibition against making a profit on securities bought and sold for customers. *See* Digest of Opinions, ¶ 220A (1957). The Comptroller now takes the position that the earliest construction of section 16 announced by his predecessors embodied an overcautious approach to bank regulation reflecting the atmosphere of the years immediately after the 1929 market crash rather than the legislative history of the Act.

The legislative history of section 16 indicates that Congress intended to leave untouched the agency practice of banks as it had previously developed. The Senate Report submitted by Senator Glass explained section 16 as follows:

> Section 16.—Undertakes to broaden the national banking laws by giving national banks all powers possessed by State banks of deposit and discount organized in the States in which such national banks are located, except insofar as they may be prohibited by Federal legislation. *National banks are to be permitted to purchase and sell investment securities for their customers to the same extent as heretofore*, but hereafter they are to be authorized to purchase and sell such securities for their own account only under such limitations and restriction as the Comptroller of the Currency may prescribe, subject to certain definite maximum limits as to amount.

> The limitations as to dealing in investment securities are not to take effect until two years after the approval of the act.

S. Rep. No. 77, 73d Cong., 1st Sess. 16 (1933) [emphasis added].

Prior to the passage of the Glass-Steagall Act, banks purchased and sold securities for the accounts of customers in a manner which, while perhaps not as extensive as AIS, considerably exceeded the narrow limits proscribed by the Comptroller's early interpretations of section 16. Banks customarily charged the account of their customers for purchases rather than have the customer make a special deposit or draw a check to cover the purchase price, charged a service fee for the transactions, and dealt in both debt and equity investments. *See, e.g., Blakey* v. *Brinson*, 286 U.S. 254 (1932); *McNair* v. *Davis*, 68 F.2d 935 (5th Cir.), *cert denied*, 292 U.S. 674 (1934); *Block* v. *Pennsylvania Exchange Bank*, 253 N.Y. 227, 170 N.E. 900 (Ct. App. 1930). The court regards AIS as consistent with the traditional agency role of commercial banks and, thus apparently within the scope of the section 16 exemption. The court would condemn AIS only if, despite its similarity to historical agency activities, it engenders additional threats to bank solvency, threats which section 16 was intended to blunt.[8]

The prohibition against banks dealing in securities for their own account contained in section 16 was intended to eradicate certain practices which undermined bank

[8] Section 16 was amended in 1935. Act of August 23, 1935, § 308, 49 Stat. 709. As originally enacted, section 16 could be construed as allowing banks only to purchase debt securities for their customers. Such an interpretation would have been out of line with historical agency activity by banks and the 1935 amendment made it clear that both debt and equity securities were within the section's exemption.

solvency and heightened the impact of the 1929 market crash. The summary appended to the 1931 Congressional hearings on the relationship between commercial banks and the securities markets reveals that three major areas of bank activity generated the most concern. According to the summary,

> The chief points of contact between the commercial banks and the security markets [which should be eliminated] may be summarized as follows:
>
> (1) Security Loans: These include loans made to brokers and dealers, as well as to other borrowers, and may be made for a variety of purposes. . . . Such loans amounted in June, 1930, to approximately 19 per cent of the total of commercial banking assets.
>
> (2) Investments: Bonds have long constituted a component element of banking assets in this country, but only during and since the World War have bond investments of banks expanded rapidly. The opening of thrift and savings departments of commercial banks tended to stimulate to a large extent the expansion of bond holdings of the banks. On June 30, 1930, investments amounted to 22 per cent of the total commercial banking assets in this country. Included in this total are securities bought under repurchase agreements from these sellers, which are more like loans than investments in nature.
>
> (3) Security affiliates: In order to operate in the securities markets in various capacities without the restrictive influences of existing statutes, a number of banks have established affiliates which enjoy identity of ownership and management with the bank, but are incorporated separately under State law and can freely operate as security companies.

> The activities of these affiliates in the major financial centers have assumed a very large scope in the case of many individual institutions, and they have hitherto attracted far less attention than their importance would deserve.

Hearings Pursuant to S. Res. No. 71 Before a Subcommittee of the Senate Committee on Banking and Currency, 71st Cong. 3d Sess. 999 (1931).

The problems created by the loans, investments, and affiliates described in the subcommittee summary were thoroughly explored by the Supreme Court in *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971). In *Investment Company Institute*, the Court decided that shares in a bank-managed investment fund sold to bank customers constituted securities within the meaning of section 16 since maintenance of the fund gave rise to the same hazards the Glass-Steagall Act was designed to curb. Consequently, banks offering shares in these funds violated the Act's mandate that banks "shall not underwrite any issue of securities or stock." 12 U.S.C. § 24 (1970).

In arriving at the conclusion that maintenance of investment funds by banks conflicted with the purposes of section 16, the Court identified several undesirable effects of the program. Especially troublesome to the majority were the facts that the funds gave banks a salesman's interest in certain investments, the banks would have a salesman's interest in the funds' performance, and the banks' prestige and credibility were threatened. Less significant dangers cited by the Court were that banks might lend money to corporations in which the fund had invested, to the fund itself, or to customers of the fund without the objectivity necessary to make sound banking judgments, banks might divert talent and resources from commercial banking to management of

the investment funds, and banks might lose the good will of customers who lost money by investing in the funds. *See* 401 U.S. at 636-38. By contrast, the Court stated, "These are all hazards that are not present when a bank undertakes to purchase stock for the account of its individual customers. . . ." *Id.* at 638.

This court is of the opinion that AIS, which does not create a separate bank-managed affiliate, but merely facilitates the purchase of securities for the account of customers, substantially avoids the hazards Congress feared when it enacted the Glass-Steagall Act. AIS banks do not have a salesman's stake in certain investments, only in a service. While banks selling shares in an investment fund are under pressure to raise capital and to increase the fund's total profit, of which they receive a set percentage, AIS banks merely sell a service to customers who have independently chosen a form of investment. Banks which offer to deduct automatically from a customer's account utility bills or mortgage payments are not selling electricity or mortgages; banks offering to deduct security purchases are not selling securities.

Banks offering AIS do not have a salesman's interest in the securities' performances. Since the banks do not manage the customers' investments, they need not prove that they perform better than anyone else. This is quite different from the situation in *Investment Company Institute*, where banks were compelled to outperform mutual funds. Under AIS, banks are in competition with investment brokers only in terms of convenience, cost, and dependability. This sort of competition does not engender the threats to bank solvency which concerned the drafters of the Glass-Steagall Act because it is independent of any investment decision.

Perhaps the most critical distinction between AIS and the practices barred by the Glass-Steagall Act is that AIS

does not threaten the prestige or credibility of banks. In managing the portfolio of an investment affiliate, banks employ the same type of judgment used in the day to day conduct of their commercial banking business. Thus, poor performance of an investment fund brings a bank's reputation directly into question. AIS involves no such day to day management and cannot in any way impugn a bank's ability to conduct its commercial banking functions.

AIS also fails to generate any of the secondary hazards cited by the Supreme Court in *Investment Company Institute*. The corporations whose securities are offered under the plan are solvent by definition and, thus, there is no need for banks offering AIS to lend them funds for the protection of customers' investments. Further, AIS contracts specify that customers participating in the plan cannot receive loans from the bank for any reason and that no purchase will be made on credit. Banks offering AIS cannot be tempted to make loans to shore up an investment affiliate since none is created. AIS banks need not divert resources from their commercial banking functions to management of AIS since the system is fully computerized. Finally, AIS will not jeopardize customer good will because those whose investments go sour will have only their own judgment to blame, not the bank's.

Plaintiffs argue that AIS, because of its unique construction, poses certain additional hazards not found in *Investment Company Institute*. First, plaintiffs allege that banks can abuse the funds held by them interest-free during the thirty day "float". While it is true that it is in the banks' interest to hold the funds as long as possible but that customers might benefit from early execution of their orders, customers are fully apprised of this potential conflict when they choose to participate in AIS. Further, abuse of the float by banks will come

under the scrutiny of federal examiners. All fiduciary services by banks give rise to potential conflicts of interest resembling those created by AIS, and examiners are trained to detect them. Bank investment activity, however, creates a qualitatively different type of conflict which is generally beyond the scope of an examiner's scrutiny.

Plaintiffs maintain that customers purchasing securities under AIS are deprived of certain protective measures imposed on broker-dealers under the Securities Exchange Act of 1934, 15 U.S.C. §§ 77-78 (1970). The Act specifically excludes banks from regulation since banks are prohibited from dealing in securities. § 3(a)(4), 15 U.S.C. § 78c (a)(4) (1970). One protection allegedly deprived purchasers is the obligation on broker-dealers to investigate the suitability of any investment it recommends to individual customers. Banks offering AIS, however, state explicitly that they make no recommendation concerning any investment. Indeed, as the Comptroller's letter points out, members of the NYSE offering comparable investment services do not consider themselves to be recommending investments and, therefore, do not feel obligated to make suitability investigations. Thus, investors purchasing securities from parties regulated by the Securities Exchange Act receive no better advice than AIS customers.

Plaintiffs state that brokers subject to the 1934 Act must disclose adverse information concerning securities they sell. To the extent this is true, AIS customers should receive the information. Banks offering AIS must purchase stocks through brokers and, thus, would be entitled to full disclosure. As agents, the banks would then be obligated to pass such information on to their principals, the customers. Although the banks themselves may be privy to inside information they need not disclose, the AIS customer will receive no less information than an investor who deals directly with a securities broker.

Brokers subject to the Securities Exchange Act must obtain the "best execution" for their customers and deliver the security promptly. AIS customers are fully informed that they are not receiving this type of service. The benefit received for giving up these features is lower commission charges. Customers willing to pay for best execution and prompt delivery will not use AIS.

Plaintiffs' final point is that AIS customers do not receive the protections provided in the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78o, 78aaa-78lll (1970). SIPA establishes accelerated procedures under which a customer can recover property left with a broker who has subsequently become insolvent and provides insurance on non-identifiable customer property up to $50,000, of which $20,000 can represent cash. AIS customers are similarly protected by the Federal Deposit Insurance Act, 12 U.S.C. §§ 264, 1728, 1811-31 (1970). FDIC insurance is now $40,000 for each depositor's account. The pooled fund held for 30 days could be considered either a part of each individual customer's account or a trust fund. In either event, the customer's cash is insured up to $40,000. Securities retained by an insolvent bank would be immediately identifiable due to AIS's computerized accounting, and, thus, would not be subject to claims of the bank's creditors.

In addition to arguing that AIS violates the Glass-Steagall Act for the reasons set forth in *Investment Company Institute* and for the further reasons just discussed, plaintiffs maintain that AIS constitutes a security as defined by the Supreme Court in *SEC* v. *W. J. Howey Co.*, 328 U.S. 293 (1946) and subsequent cases interpreting the Securities Act of 1933, 15 U.S.C. § 77 (1970). This argument has no place in this litigation. The Supreme Court's opinion in *Investment Company Institute* was devoted principally to defining the term "security" as used in the Glass-Steagall Act, and not once does the opinion make reference to *Howey* or its progeny. The Securities Act has a different legislative history and different underlying policies from the Glass-Steagall Act. The material question in the instant case is whether AIS comports with the policies of the Glass-Steagall Act, and the court believes that question has been adequately analyzed above.

The court concludes that the Comptroller's interpretation of the Glass-Steagall Act is both reasonable and correct as a matter of law, and, consequently will grant summary judgment for the defendant. An appropriate judgment accompanies this Memorandum Opinion.

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
United States District Judge

Date: December 5, 1975

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1405

NEW YORK STOCK EXCHANGE, INC., and
INVESTMENT COMPANY INSTITUTE,
Plaintiffs,

v.

JAMES E. SMITH, COMPTROLLER OF THE CURRENCY,
THE DEPARTMENT OF THE TREASURY,
Defendant.

[Filed Dec. 5, 1975, James F. Davey, Clerk]

JUDGMENT

Upon consideration of the parties' cross-motions for summary judgment, it appearing that there exists no genuine issue of material fact, and that defendant is entitled to judgment as a matter of law, and for the reasons stated in the Memorandum Opinion filed with this Judgment, it is by the court this 5th day of December, 1975

ORDERED, ADJUDGED, and DECREED that plaintiffs' motion for summary judgment should be, and the same hereby is, denied; and it is further

ORDERED, ADJUDGED and DECREED that defendant's motion for summary judgment should be, and the same hereby is, granted; and it is further

ORDERED, ADJUDGED, and DECREED that judgment be entered for defendant.

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1235

NEW YORK STOCK EXCHANGE, INC. and
INVESTMENT COMPANY INSTITUTE, APPELLANTS

v.

ROBERT BLOOM,

ACTING COMPTROLLER OF THE CURRENCY

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 74-1405)

Argued May 4, 1977

Decided July 19, 1977

Before WRIGHT, MCGOWAN and TAMM, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* MCGOWAN.

Concurring Opinion filed by *Circuit Judge* WRIGHT.

MCGOWAN, *Circuit Judge*: Appellants New York Stock Exchange, Inc. (NYSE) and Investment Company Institute (ICI) sued in the District Court for declaratory and injunctive relief against two informal expressions of opinion by the Comptroller of the Currency to Security

Pacific National Bank (Security Pacific) that the latter's proposed automatic stock purchasing service would not violate sections 16 and 21 of the Banking Act of 1933 (the Glass-Steagall Act), 12 U.S.C. §§ 24, 378 (1970). The District Court granted summary judgment on the merits in favor of the Comptroller, after rejecting his threshold contentions that the actions in question were not ripe for review, and that appellant lacked standing and had failed to join indispensable parties. *New York Stock Exchange, Inc.* v. *Smith*, 404 F. Supp. 1091 (D.D.C. 1975). We find the challenged opinions to be unripe for judicial scrutiny.

I

Sections 16 and 21 of the Glass-Steagall Act impose strict limitations on the authority of banks to purchase, sell, issue, underwrite, distribute, or otherwise deal in stocks and securities. Section 16 provides in pertinent part:

> The business of dealing in securities and stock by [a national banking] association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: *Provided*, That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe.

12 U.S.C. § 24(7) (1970). And section 21 specifies:

> (a) . . . it shall be unlawful—
>
> (1) For any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of [deposit banking]: *Provided*, That the provisions of this paragraph shall not prohibit national banks . . . from dealing in, underwriting, purchasing, and selling investment securities to the extent permitted . . . by the provisions of section 24 of this title . . . .

Id. § 378(a)(1).

On February 12, 1973, Security Pacific wrote to the Comptroller, requesting his opinion as to whether the "Automatic Investment Service" (AIS) which the bank was proposing to establish would be consistent with sections 16 and 21 of the Glass-Steagall Act. As described in Security Pacific's letter, AIS would permit the bank's checking account customers to invest, through regular monthly deductions from their accounts, in stocks individually selected by the customers from a list of the twenty-five corporations on Standard & Poor's 425 Industrial Index having the highest aggregate market value of outstanding stock. For each stock selected, the customer would be required to authorize an automatic monthly deduction of between $20 and $500, to be invested each month until the customer terminated his participation in the plan.

The proposed method for purchasing and holding shares was described by Security Pacific as follows:

> Those electing to purchase stock will have their monthly deductions pooled with money of all others acquiring the same stock under the Service. Periodically, but not less frequently than once every month, the Bank will establish a cut-off date and promptly thereafter will acquire shares of each of the common stocks with all funds available, after

deducting the service charge.[1] The funds will include any dividends that have been received by the Bank on full and fractional shares that it, or its nominee, is holding in safekeeping for users of the Service. The time between any cut-off date and the subsequent completion by the Bank of the acquisition of shares of common stock with funds obtained prior to the cut-off date will hereinafter be referred to as an "Acquisition Interval". Such Acquisition Interval shall not exceed thirty days. The price per share (including fractional shares) that will be charged each person who acquires shares of a stock during any particular Acquisition Interval will be the average price (including brokerage costs) paid by the Bank for all shares of that stock purchased by it under the Service during that Acquisition Interval. All the shares acquired under the Service will be held in the Bank's name or in the name of its nominee but the Bank will deliver, upon request, certificates representing whole shares to the owner.

Although the stock would be held in the name of the bank, each customer would have the right to vote the number of shares purchased on his behalf, and any customer wishing to withdraw from the Service would have a choice of receiving stock certificates representing the number of shares beneficially owned by him, or their cash value. The bank would have the power to "cross" sales made on behalf of customers withdrawing from the program with purchases for the account of continuing participants, thus saving the cost of brokerage.

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[1] The letter stated that the service charge would be 5% of the amount invested, up to a maximum of $2.00 per month. In addition, each participant would be charged a pro rata share of the brokerage costs on the shares acquired.

On February 27, 1973, the Comptroller sent a brief letter to Security Pacific's counsel, responding to the February 12 inquiry. The letter stated, without any supporting analysis, the Comptroller's opinion that AIS, as set forth in Security Pacific's letter,

> (1) Involves only purchases for the account of customers and not for the bank's own account; (2) That the bank in creating and managing the Service is not engaged in the business of issuing, underwriting, selling or distributing securities; and (3) That the operation of the Service by the bank is consistent with the provisions of section[s] 24 and 378 of Title 12, of the United States Code.

Learning of the existence of this letter, ICI—a national association of mutual funds, and their investment advisers and principal underwriters—wrote a letter and supporting memorandum, dated August 15, 1973, requesting the Comptroller to reconsider the position he had taken in his letter to Security Pacific. A similar request was filed by NYSE on September 7, 1973.

Citing interpretative rulings issued by the Comptroller's Office in the years immediately following enactment of the Glass-Steagall Act, both groups argued that the Act allows banks to purchase stocks only for pre-existing customers as a non-profit courtesy service; AIS—which they characterized as a profit-oriented activity utilizing extensive advertising to attract new customers to the bank—clearly would go beyond this domain. Appellants asserted, further, that AIS would present the same hazards which the Supreme Court identified in *Investment Company Institute* v. *Camp*, 401 U.S. 617, 636-38 (1971), in support of its holding that operation of a collective investment fund involves a bank in activities which violate sections

16 and 21 of the Glass-Steagall Act. According to appellants, AIS—like operation of a collective investment fund —would "give rise to a promotional or salesman's stake in a particular investment," which "might distort its credit decisions or lead to unsound loans to the companies" whose stock has been purchased through AIS; "involve [the bank] in direct competition with aggressively promoted funds offered by other investment companies"; and "impair the bank's ability to give disinterested service as a fiduciary or managing agent." *Id.* at 637-38; *see id.* at 636-38.

Upon receipt of ICI's request for reconsideration of the advisory opinion expressed in the February 27, 1973 letter to Security National, the Deputy Chief Counsel for the Office of the Comptroller wrote to respective counsel for Security Pacific, Chase Manhattan Bank (which ICI's letter had identified as a bank then providing a service virtually identical to AIS), and Investment Data Corporation (the firm which developed AIS), informing them of ICI's letter and inviting them to submit any comments which they desired to the Comptroller to consider in connection with that letter. A memorandum supporting the February 27 ruling was submitted by counsel for Security Pacific, on behalf of Security Pacific and Investment Data Corporation; and opposing memoranda were submitted by ICI and NYSE.

On June 10, 1974, the Comptroller sent a letter to counsel for ICI, reaffirming his opinion that AIS is consistent with the Glass-Steagall Act. In contrast to the February 27, 1973 ruling, this letter contained a more extensive analysis of the underlying issues. The Comptroller noted, first, that AIS falls within the plain language of section 16, inasmuch as the service consists only of purchases and sales of stock upon the order, and for the account, of bank

customers. After reviewing the legislative history of the Act, the Comptroller concluded, moreover, that Congress did not intend to prohibit profit or advertising with respect to such agency transactions, and that earlier interpretative rulings to the contrary resulted from the conservatism of the times and were simply erroneous.

As to the hazards alluded to by the Supreme Court in *ICI* v. *Camp*, *supra*, the Comptroller expressed only a tentative and provisional position:

> We are not unmindful of the potential for abuse, but until such time as abuse develops, we should not strain the meaning of 12 U.S.C. § 24 to stifle banks' competition in the free market for the patronage of American investors.

The Comptroller analyzed, among others, the contentions that AIS would impair the bank's ability to give disinterested investment advice, tempt the bank to make unsound loans to companies whose stock was purchased, and create conflicts of interest between the bank and its customers. In each case, however, he concluded that the alleged danger was not sufficient, without more experience of actual operation, to make AIS inconsistent with the Glass-Steagall Act.

Appellants filed an action in the District Court on September 24, 1974. Their complaint requested (1) a declaratory judgment that AIS is unlawful under sections 16 and 21 of the Glass-Steagall Act, and that the Comptroller's informal opinion of June 10, 1974 was consequently in excess of his statutory authority, (2) an injunction requiring the Comptroller to withdraw his June 10, 1974 ruling and to refrain from "approving" the operation of AIS by any commercial bank, and (3) an injunction forbidding the Comptroller from "continuing

in effect" any "approvals" which may have been given to other banks.

The Comptroller moved to dismiss on the grounds that indispensable parties—the banks offering AIS—had not been joined; the informal opinions of February 27, 1973 and June 10, 1974 were not ripe for review; and NYSE lacked standing to sue.[2] The Comptroller moved, in the alternative, for summary judgment on the ground that his opinions were consistent with the Glass-Steagall Act; and appellants filed a cross-motion for summary judgment on the merits.

The District Court found that both appellants had standing, 404 F. Supp. at 1093, and ruled against the contention that indispensable parties had not been joined, *id.* at 1096. The court recognized that the ripeness of the informal rulings was a "more substantial issue," *id.* at 1094, but, relying heavily on *National Automatic Laundry and Cleaning Council* v. *Shultz*, 443 F.2d 689 (D.C. Cir. 1971) (*NALCC*), and *Continental Air Lines, Inc.* v. *CAB*, 522 F.2d 107 (D.C. Cir. 1975) (*en banc*), it held that judicial review was appropriate. With respect to the fitness of the issues for judicial decision, the court observed that an opinion letter similar in form to the ones in question here was found sufficiently final for review in *NALCC*, and expressed its judgment that the instant case "presents a 'purely legal' question only," 404 F. Supp. at 1095, *quoting Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967).

While conceding that appellants "are not facing the dilemma of obeying a questionable ruling or accepting the consequences of violating it," the position in which the

[2] Although the Comptroller asserted in the District Court that neither appellant had standing to sue, its motion to dismiss was directed only against NYSE for the reason that he could prove lack of injury to ICI's members only after discovery.

plaintiffs in *Continental Air Lines* and *NALCC* found themselves, the District Court concluded that "the need for review is even stronger in the instant case than it was in *Continental Air Lines* or *NALCC* since the agency actions attacked in [those cases] would come under judicial scrutiny when a party chose to disobey the agency, but the action attacked by plaintiffs here will never come under review if this case is dismissed." 404 F. Supp. at 1095. Having thus disposed of the preliminary issues, the District Court turned to the "substantive" question of whether the Comptroller's advisory opinions reflected an accurate interpretation of the Glass-Steagall Act. After considering at some length the competing contentions of the parties, the court upheld the Comptroller's view. *Id.* at 1096-1101.

Appellants now urge us, on the basis of essentially the same arguments which they made to the Comptroller and then in the court below, to reverse the District Court and to hold that AIS contravenes the Act. For his part, the Comptroller again asserts that this issue should not be reached, citing alternative grounds of ripeness and standing.[3] If we do reach the substantive question, the Comptroller of course requests that we affirm the judgment of the District Court. Since we agree with the Comptroller's contention that the informal rulings attacked by appellants are not ripe for review, we express no judgment on the other issues argued before us.

II

The general principles governing the ripeness of administrative action for review are now well-established. As the *en banc* opinion of this court in *Continental Air Lines, Inc.* v. *CAB*, 522 F.2d 107, 124 (D.C. Cir. 1975),

[3] The Comptroller has not pressed the claim that the suit should be dismissed for failure to join indispensable parties.

observed, before holding a formal policy statement by the CAB to be ripe for review:

> The law of ripeness, once a tangle of special rules and legalistic distinctions, is now very much a matter of practical common sense. *Abbott Laboratories, Inc.* v. *Gardner*, 387 U.S. 136 (1967), dominates the field. It teaches that
>
> > the ripeness doctrine['s] . . . basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by challenging parties.
>
> The same case prescribes a methodology for deciding whether a particular agency action is ripe for review:
>
> > The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Id. at 148-49.

The label an agency attaches to its action is not determinative. The action may be reviewable even though it is merely an announcement of a rule or policy that the agency has not yet put into effect. Indeed, agency action may be reviewable even though it is *never* to have any formal, legal effect. What is required is that the interests of the court and agency in postponing review until the question arises in some more concrete and final form, be outweighed by the interest of those who seek relief from the challenged action's "immediate and practical impact" upon them.

> The former interests are encompassed within the first half of the *Abbott Laboratories* "twofold aspect," the "fitness of the issues for judicial decision," while the latter interests are expressed in the second part, the "hardship to the parties of withholding court consideration."

522 F.2d 124-25 (footnotes omitted) (emphasis in original). We proceed here, as we did in *Continental Air Lines*, by examining in turn the two aspects of ripeness outlined in *Abbott Laboratories*.

With respect to the fitness of the issues for judicial decision, we note first that appellants are challenging informal opinion letters rather than formal rules or policy statements. Although the letters were signed by the agency head, and the second ruling followed consideration of adversary legal memoranda, the form of the Comptroller's action in fact reflected the tentative nature of his interpretative conclusion. Unlike the opinion letter in *National Automatic Laundry and Cleaning Council* v. *Shultz*, 443 F.2d 689 (D.C. Cir. 1971), in which a general question of statutory construction had been conclusively resolved on the basis of the legislative history alone, the Comptroller in the instant case expressly reserved the possibility that his opinion, which extended only to the permissibility of the particular service proposed by Security Pacific, might change if and when he was presented with concrete evidence that AIS involves the hazards which the Glass-Steagall Act was intended to prevent. To be sure, the Comptroller did state what would appear to be relatively final positions regarding the consistency of AIS with the language of the Act, and his disagreement with the reading of the Act's legislative history which had been implicit in the narrower interpretative rulings issued by his predecessors, but these positions would in no way be incompatible with a future finding, based on evidence of AIS's actual operations,

that it generates hazards sufficient to create a violation of the Act.

By the same token, we cannot agree with the district Court that the question decided by the Comptroller was "purely legal." No doubt determining the general interest of Congress from the language and history of the Act is a matter of law, but an assessment of the factual consequences of AIS to determine whether it falls within the scope of the congressional concerns requires resolution of factual issues, and an application of law to fact. While appellants contest, at the outset, the Comptroller's reading of the legislative history, a substantial part of their argument at all stages of this case has revolved around their disagreement with the Comptroller's estimate of the factual implications of AIS. To this extent, judicial review of appellant's claims would be aided by further factual development. *Compare Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 149.

Given these shortcomings with regard to the fitness of the issues for judicial decision, it would take a substantial showing of hardship to the parties to convince us that the Comptroller's actions are ripe for review. No such showing has been made.

In *Abbott Laboratories*, *NALCC*, and *Continental Air Lines*, the alternatives to immediate review were quite severe: the parties either would have had to accept the adverse consequences of complying with the agency rulings in question, or risk serious penalties for noncompliance in order to obtain review at a later time. In each of the cases, this direct and immediate impact on the parties was an important factor in finding the rulings ripe for review. *See* 387 U.S. at 152-53; 522 F.2d at 126-28; 443 F.2d at 696-97. Here, in contrast, appellants' conduct is not directly regulated by the agency action at issue and consequently they are not facing a "Hobson's choice" between burdensome compliance and risky non-

compliance. Nonetheless, on the assumption that denial of review now would mean that appellants' claim would never come under judicial scrutiny, the District Court concluded that the need for review is even stronger in the instant case than it was in *Continental Air Lines* or *NALCC*. Believing, as we do, that the District Court's assumption was erroneous, we must disagree with its conclusion as to the necessity of review at this time.

Appellants concede, and the Comptroller agrees, that they could bring a private action for injunctive relief, advancing the same substantive claim they have made here directly against any national bank which offers AIS to its customers. Although we have been unable to find any case law squarely on point, and in any event are without power to make an authoritative ruling on the issue since it is not currently before us, we have no reason to believe that appellant would not have a private right of action for injunctive relief under the Glass-Steagall Act.[4] The express language of the statute

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[4] In Investment Co. Institute v. Camp, 401 U.S. 617 (1971), ICI brought suit solely against the Comptroller, challenging, first, a regulation promulgated by the Comptroller purporting to authorize operation of collective investment funds by banks and, second, the Comptroller's approval of First National City Bank's individual application to operate such a fund. When ICI prevailed in the District Court, 274 F. Supp. 624 (D.D.C. 1967), First National City Bank was granted leave by that court to intervene for the purposes of appeal, *see* J.A. 286-87 in First National City Bank v. Investment Co. Institute, 420 F.2d 83 (D.C. Cir. 1969), *rev'd sub nom.* ICI v. Camp, *supra*, and was a participating party in both this court and in the Supreme Court. Under the circumstances, none of the decisions in the case had occasion to address the question of whether ICI could have brought an action directly against First National City Bank.

In Russell v. Continental Illinois Nat'l Bank & Trust Co., 479 F.2d 131 (7th Cir.) (Stevens, J.), *cert. denied*, 414 U.S. 1040 (1973), the Seventh Circuit held only that *investors* in a mutual fund operated by a bank did not have a private right of action for *damages* against the bank under the Glass-Steagall Act. The case did not involve a claim for injunctive relief; moreover, in concluding that investors in

neither authorizes nor precludes such an action, but under the standards set forth in recent Supreme Court decisions we would suppose, first, that an implied right of action for injunctive relief would exist for appropriate parties and, second, the appellants would qualify as proper plaintiffs.[5]

Appellants contend that it would be unduly burdensome to bring a multitude of private actions against individual banks offering AIS. But it is not at all clear, especially in light of the very limited number of banks offering AIS or its equivalent, that a single successful private action would not be just as effective, in convincing the Comptroller to change his position on AIS, as a reversal in the instant case. And, in any event, we do

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bank-operated mutual funds were not within the class of persons intended to be protected by the statute, the court specifically distinguished the interests of such investors from the interests of ICI and its members, which the Supreme Court found sufficient to create standing to bring an action against the Comptroller in ICI v. Camp, *supra*. *See* 479 F.2d at 133.

[5] Both of these questions apparently would be governed by the general criteria set forth in Cort v. Ash, 422 U.S. 66 (1975), and reaffirmed in Piper v. Chris-Craft Indus., Inc., 97 S.Ct. 926, 947-49 (1977);

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . .—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 78 (citations omitted) (emphasis in original).

The Supreme Court's holding in ICI v. Camp, 401 U.S. at 620-21, "that Congress did legislate against the competition" which ICI challenged in that case, *see* note 4 *supra*, while not dispositive of the first issue, strongly suggests that appellants are part of the class for whose "*especial* benefit" the Glass-Steagall Act was passed.

not consider the inconvenience of having to initiate more than one suit to be a hardship sufficient to justify review in the current circumstances. *Cf. National Association of Insurance Agents* v. *Board of Governors*, 489 F.2d 1268, 1271 (D.C. Cir. 1974).[6]

What appellants would have the courts do in this case is to determine the correctness of an informal statement by the Comptroller to the effect that he would not now take any action if Security Pacific goes forward with its proposed AIS, although he might take a different view of its compatibility with the Glass-Steagall Act at some point in the future after there has been some experience with its actual operation.[7] This is sought to be done at the instance of parties who, although very possibly pos-

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[6] We note, in this regard, the command of the Administrative Procedure Act that "final agency action *for which there is no other adequate remedy in a court* [is] subject to judicial review." 5 U.S.C. § 704 (1970) (emphasis supplied).

There is language in Medical Committee for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970) (holding an SEC "no action" letter passed upon by the Commission to be reviewable), *cert. granted*, 401 U.S. 973, *vacated as moot*, 404 U.S. 403 (1972), suggesting that the availability of a private right of action should carry relatively little weight in evaluating ripeness. *See id.* at 667-68, 672. Whatever the force of that suggestion in the context of the proxy fight involved in that case, we are not persuaded that the bank competitors seeking review here would suffer hardship if they were forced to bring a private action instead. At any rate, the precedential value of this court's decision in *Medical Committee* was substantially diminished by the action of the Supreme Court in taking the case for review on the merits, which did not come about only by reason of the intervention of mootness.

[7] Under 12 U.S.C. § 1818(b) (1970), the Comptroller has authority to initiate cease-and-desist proceedings against any national bank which he believes to be engaging in a violation of the banking laws. It is conceivable that failure by him to exercise this authority would, in appropriate circumstances, be reviewable at the instance of interested parties under the standard of 5 U.S.C. § 706(2)(A) ("arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law"). *See* Dunlop v. Bachowski, 421 U.S. 560 (1975).

sessed of standing to litigate the question in some circumstances, are not themselves subject to regulation by the Comptroller and who will be under no compulsion to do, or to refrain from doing, anything by reason of the advisory opinion in question. Neither is there now before the court any bank currently providing AIS or purporting to do so.

The record made in such a lawsuit would be barren indeed with respect to information highly relevant to, and informative of, the applicability of the statutory provisions in question. As indicated above, appellants have other avenues open to them for more meaningful and authoritative judicial resolution of the validity of AIS.

Since the agency action challenged here is not ripe for review, the decision of the District Court is vacated, and the case is remanded with instructions to dismiss the complaint.

It is so ordered.

WRIGHT, *Circuit Judge, concurring*: I concur in the court's opinion. Because I believe that Judge McGowan is correct in suggesting that the appellants do have a private right of action under the Glass-Steagall Act against banks using Automatic Investment Services, appellants should first be required to put the issue in more concrete form by exploring that avenue of potential relief. However, if it is ultimately held that appellants lack a private right of action, prudential concerns inhering in the "hardship to the parties of withholding court consideration" [1] would, in my judgment, remove any doubt as to the ripeness of a subsequent suit by appellants against the Comptroller. There should be some means to obtain review of the Comptroller's interpretation of the statute.[2]

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[1] *Abbott Laboratories, Inc.* v. *Gardner*, 387 U.S. 136, 149 (1967).

[2] *See Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975); *Abbott Laboratories, Inc.* v. *Gardner*, *supra* note 1, 387 U.S. at 139-140; *Stark* v. *Wickard*, 321 U.S. 288, 307-308 (1944).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1976

No. 76-1235

Civil Action 74-1405

[Filed Aug. 31, 1977]

NEW YORK STOCK EXCHANGE, INC., AND
INVESTMENT COMPANY INSTITUTE,
Appellants

v.

JAMES E. SMITH, Comptroller of the Currency,
The Department of the Treasury

BEFORE: Wright, McGowan and Tamm, Circuit Judges

ORDER

On consideration of the petition for rehearing filed by appellants, it is

ORDERED by the Court that appellants' aforesaid petition is denied.

Per Curiam
For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NEW YORK STOCK EXCHANGE, INC., AND
INVESTMENT COMPANY INSTITUTE,
Appellants

v.

JAMES E. SMITH, Comptroller of the Currency,
The Department of the Treasury

BEFORE: Bazelon, Chief Judge, Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by appellants, having been transmitted to the full Court and no Judge having requested a vote with respect hereto, it is

ORDERED by the Court, *en banc*, that appellants' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX E

Section 16 of the Glass-Steagall Act (12 U.S.C. § 24) provides in pertinent part:

> The business of dealing in securities and stock by the [national banking] association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock. . . .

Supreme Court, U. S.
FILED
MAR 8 1978
MICHAEL RODAK, JR., CLERK

No. 77-736

In the Supreme Court of the United States

OCTOBER TERM, 1977

NEW YORK STOCK EXCHANGE, INC., AND INVESTMENT COMPANY INSTITUTE, PETITIONERS

v.

JOHN G. HEIMANN, COMPTROLLER OF THE CURRENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 53a-69a) is reported at 562 F. 2d 736. The opinion of the district court (Pet. App. 32a-51a) is reported at 404 F. Supp. 1091.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1977. A timely petition for rehearing was denied on August 31, 1977 (Pet. App. 70a-71a). The petition for a writ of certiorari was filed on November 23, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' challenge to letters of the Comptroller of the Currency expressing the opinion that certain conduct would be legal under the Glass-Steagall Act is ripe for judicial review.

STATEMENT

On February 12, 1973, counsel for the Security Pacific National Bank wrote to the Comptroller of the Currency requesting an opinion whether an investment service that the bank desired to establish would violate Sections 16 and 21 of the Glass-Steagall Act, 48 Stat. 184, 189, as amended, 12 U.S.C. 24 (Seventh), 378(a)(1). The bank had proposed to offer an "Automatic Investment Service" (AIS), under which the bank's regular checking account customers would be permitted to purchase stocks from a list of 25 selected securities. The purchases would be paid for by automatic monthly deductions from the customers' checking accounts (Pet. App. 55a).

The Comptroller responded on February 27, 1973, in a brief letter (Pet. App. 1a-2a) stating that the bank's proposed program would be consistent with Sections 16 and 21 of the Glass-Steagall Act, which prohibit banks from selling securities except on order of and for the account of their customers.

Petitioner Investment Company Institute requested the Comptroller to reconsider the legality of the AIS proposal. In response to that request, the Comptroller wrote a second letter (Pet. App. 3a-31a), reaffirming the position that the AIS proposal is consistent with the Glass-Steagall Act.

The second letter contained a more complete statement of the Comptroller's views. It stated that Section 16 of the Glass-Steagall Act permits national banks to engage

in "purchasing and selling * * * securities and stock without recourse, solely upon the order, and for the account of, customers * * *" (12 U.S.C. 24 (Seventh)). The Comptroller stated that the Act does not prohibit a bank from advertising its intention to provide an investment service for its customers, nor does it bar the bank from charging a fee for the service. He added that the Comptroller's office was "not unmindful of the potential for abuse," but he concluded that any action to bar banks from instituting services such as the AIS plan should be postponed "until such time as abuse develops" (Pet. App. 30a).

Petitioners then commenced this action in the United States District Court for the District of Columbia, seeking both a declaratory judgment that AIS is unlawful under the Glass-Steagall Act and an injunction requiring the Comptroller to withdraw his June 10, 1974, opinion letter and to refrain from "approving" the operation of AIS by any commercial bank. The Comptroller moved to dismiss, arguing, *inter alia,* that the informal opinion letter is not "final" agency action reviewable under Section 10 of the Administrative Procedure Act, 5 U.S.C. 704. The district court refused to dismiss the case on ripeness grounds, but it granted summary judgment for the Comptroller, holding that AIS, as described in the Comptroller's letter, does not violate the Glass-Steagall Act (Pet. App. 32a-51a).

The court of appeals did not reach the merits. It held, instead, that the Comptroller's opinion letters are not ripe for judicial review. The court observed that: the opinion letters are informal and tentative interpretations rather than formal rules or policy statements; the question addressed by the Comptroller was not "purely legal" in nature but would require resolution of factual issues

before it could conclusively be determined; there is no "direct and immediate impact" on petitioners as the result of the opinion letters (Pet. App. 64a); and, as the parties agreed, petitioners apparently may bring a private action for injunctive relief against any national bank that offers AIS to its customers (*id.* at 65a-67a). Accordingly, the court of appeals remanded the case to the district court with instructions to dismiss the complaint.

ARGUMENT

This case involves the application of well-settled principles of the law of ripeness. There is no dispute about the governing principles; the question is simply whether those principles were correctly applied by the court of appeals in this case. Because ripeness for review is a pragmatic standard turning on the facts of each case (*Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149-150; *Buckley* v. *Valeo*, 424 U.S. 1, 113-118), the application of the doctrine of ripeness to the facts of this case does not require review by this Court.[1] In any event, the decision of the court of appeals is correct.

In *Abbott Laboratories*, the Court observed that courts rightly hesitate to interfere with administrative determinations unless they "arise in the context of a

[1]Petitioners also have urged this Court to resolve the question whether AIS violates Section 16 of the Glass-Steagall Act (Pet. 6-9). Because of its ruling on the ripeness question the court of appeals did not address this issue. Accordingly, even if this Court should decide that the court of appeals erred in holding that the case is not ripe for review, the Court should not decide a question on which the court of appeals has not had occasion to pass. See *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 156.

controversy 'ripe' for judicial resolution." 387 U.S. at 148. The rationale of the doctrine, the Court stated (387 U.S. at 148-149),

> is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

In this case, the court of appeals determined both that the issue presented was not fit for judicial decision and that petitioners would not suffer undue hardship if they were denied immediate judicial consideration of that issue.

The Comptroller's opinion letters are not formal rules or policy statements, but instead express only a "tentative * * * interpretative conclusion" (Pet. App. 63a) about the legality of AIS under the Glass-Steagall Act. The Comptroller stated in his second opinion letter that he might change his views if he were presented with evidence that the actual operation of AIS was resulting in the kinds of abuses that the Glass-Steagall Act was intended to prevent. But "unless there is actual or immediate threatened abuse," he concluded, "regulatory prohibitions are not justified" (Pet. App. 30a). Because the Comptroller's opinion letters are only tentative and contemplate further consideration of the legality of AIS in light of further factual development, those opinion letters do not present issues that are well suited for judicial determination under the first branch of the test in *Abbott Laboratories*.

Petitioners have failed to satisfy the second branch of the *Abbott Laboratories* test as well, for they have failed to demonstrate that any substantial hardship would result from the denial of judicial consideration of the views expressed in the Comptroller's opinion letters. Unlike the rules challenged in *Abbott Laboratories*, the Comptroller's letters do not directly affect petitioners, because the Comptroller's views do not impose on them any duty to comply with a regulatory requirement or any risk of suffering serious penalties for non-compliance. See *Bethlehem Steel Corp.* v. *United States Environmental Protection Agency*, 536 F. 2d 156, 163 (C.A. 7). In addition, as all parties agreed (Pet. App. 65a), petitioners apparently could raise their arguments against AIS in a private action for injunctive relief against a bank offering AIS to its customers. Such an action, unlike the instant suit, would provide a distinct factual setting within which the legal issue could properly be addressed. Cf. *Toilet Goods Association, Inc.* v. *Gardner*, 387 U.S. 158, 164-165.

Petitioners suggest (Pet. 5 n. 2) that the alternative of litigation against banks offering AIS would burden them with the need to file multiple private actions. Yet if national banks adopt AIS programs patterned on the Security Pacific National Bank's program, a single lawsuit against a single typical bank should serve to resolve the legal issue. If, on the other hand, different banks employ significantly different versions of AIS, that fact would underscore the impropriety of reviewing in this case the Comptroller's abstract opinion letter without the benefit of detailed factual development in a concrete setting. See *Toilet Goods Association, Inc.* v. *Gardner, supra*, 387 U.S. at 164; *International Longshoremen's and Warehousemen's Union, Local 37* v. *Boyd*, 347 U.S. 222, 224.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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